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Judge Davis

SUPREME COURT OF THE UNITED STATES.

No. ~~266.~~ ~~142.~~ 72

LEVI BLOSSOM, APPELLANT,

vs.

THE MILWAUKIE AND CHICAGO RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

GOVERNMENT PRINTING OFFICE.

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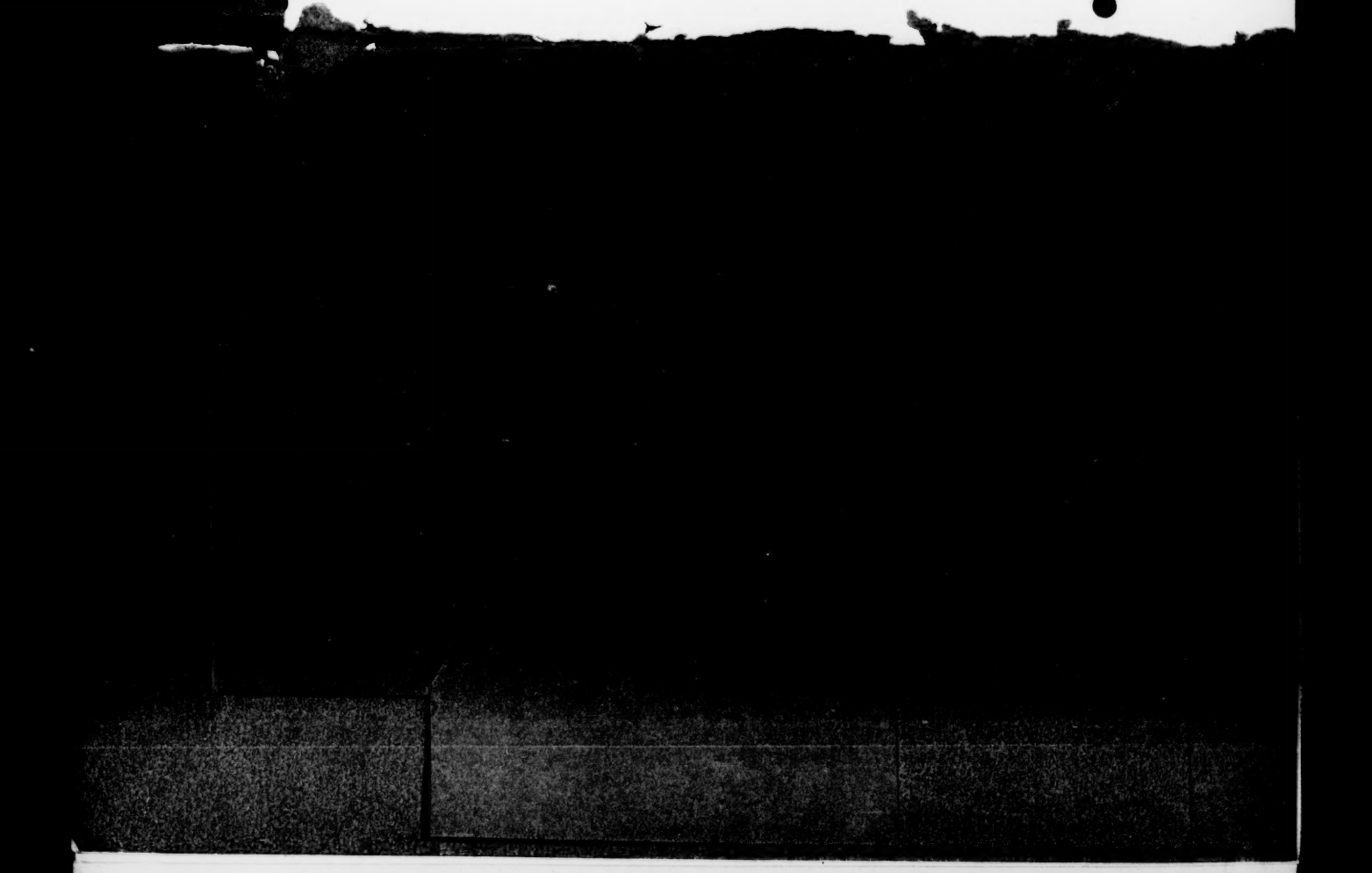

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No. 266.

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vs.

THE MILWAUKIE AND CHICAGO RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

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District court of the United States of America for the dist. of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a special term of the district court of the United States of America for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district of Wisconsin, on the second Monday (being the eleventh day) of November, A. D. 1861.

Present, the honorable Andrew G. Miller, judge of said court, presiding; Darius C. Jackson, marshal; John M. Miller, clerk.

Among other, the following proceedings were had, to wit:

E. FERRIS BISHOP and JOHN W. STEWART, trustees, Iron Bank, Farmers' Bank, Pequonnoc Bank, The Patterson Iron Company, S. S. Robbins, William D. Bishop, W. J. Canfield, administrator of the estate of Lee Canfield, deceased, Charles Palmer, Frederick Schuchardt, Frederick C. Gebhard, Frederick Gebhard Schuchardt, Francis Vose, Charles L. Perkins, John B. Kettell, Morris K. Jessup, Salem H. Wales, J. W. Lewis, W. Jamieson, American Exchange Bank, Corn Exchange Bank, and Charles L. Frost, complainants,
vs.
MILWAUKEE & CHICAGO RAILROAD COMPANY, defendant.

Be it remembered, that heretofore, to wit, on the fifteenth day of October, A. D. 1861, came the above-named complainants, by their solicitors, Mess. Carey and Pratt, and filed a bill of complaint against the above-named defendant, as follows:

To the judge of the district court of the United States for the district of Wisconsin, in equity.

E. Ferris Bishop and John W. Stewart, trustees as hereinafter mentioned, and citizens of the State of Connecticut, Iron Bank, Farmers' Bank, and Pequonnoc Bank, each a corporation created and organized under and by virtue of the laws of the State of Connecticut, and doing business in said State, The Patterson Iron Company, a corporation created and organized under and by virtue of the laws of the State of New Jersey, and doing business in said State, S. S. Robbins, William D. Bishop and W. J. Canfield, administrators of the estate of Lee Canfield, deceased, citizens of the State of Connecticut, Charles Palmer, Frederick Schuchardt, Frederick C. Gebhard, Frederick Gebhard Schuchardt, Francis Vose, Charles L. Perkins, John B.

Kettell, Morris K. Jessup, and Salem H. Wales, and J. W. Lewis and W. Jamieson, citizens of the State of New York, American
2 Exchange Bank and Corn Exchange Bank, each a corporation organized and created under and by virtue of the laws of the State of New York, and doing business in said State, bring this their bill against the Milwaukee & Chicago Railroad Company, a corporation created under and by virtue of the laws of the State of Wisconsin, and doing business in said State, bring this their bill against the Milwaukee & Chicago Railroad Company, a corporation created and organized under and by virtue of the laws of the State of Wisconsin, and doing business in said State, and thereupon your orators complain and say, that on the 22d day of June, in the year 1858, the defendant, Milwaukee & Chicago Railroad Company, was a corporation duly organized and doing business under and by virtue of the laws of Wisconsin; that it was first organized under an act approved March 13th, 1851, under the name of the Green Bay, Milwaukee & Chicago Railroad Company, and that by an act approved March 6th, 1857, the name of the said company was changed to the Milwaukee & Chicago Railroad Company, by which name it has since been known, and that as such corporation it had authority to locate and construct, and had located and constructed, and was then operating a railroad from the city of Milwaukee, in the county of Milwaukee, in the State of Wisconsin, in a southerly direction through the cities of Racine and Kenosha, in said State, to the State line between the States of Wisconsin and Illinois, and that it had power and authority to acquire land and other real and personal property for the construction, use, and maintenance of the same, and with power to borrow any
3 sum or sums of money, and for any rate of interest, and to make and execute all necessary writings, and deliver such securities in amount and kind as might be deemed expedient by said corporation for the purposes of constructing said railroad; that the firm of Bishop & Co. was, on the said 22d day of June, 1858, and for several years prior thereto had been, composed of your orators Ethan F. Bishop and John W. Stewart, and that the said firm had been engaged in building the railroad of said corporation, and furnishing materials for the same, and had loaned it large sums of money, and in divers ways become surety for it do divers parties; that on the said 22d day of June, 1858, the said railroad company was indebted to divers persons in the sum of about one hundred and thirty-seven thousand three hundred and seventy-six dollars on the drafts of said company, drawn by the said company on their local treasurer in the city of New York, accepted by said treasurer, payable to the order of Bishop & Co., and endorsed by them, which said drafts were payable at the office of the company in New York, and were of the dates, numbers, and amounts, and payable at the times hereafter named, respectively, to wit:

Draft No.	127,	dated	Feb'y	6, 1857,	payable	Nov.	9, 1857,	for	$5,000 00
"	126,	"	Feb'y	6, 1857,	"	Nov.	9, 1857,	"	5,000 00
"	178,	"	May	16, 1857,	"	Jan'y	15, 1858,	"	5,000 00
"	149,	"	M'ch	15, 1857,	"	Oct.	18, 1857,	"	2,000 00
"	150,	"	M'ch	15, 1857,	"	Oct.	18, 1857,	"	3,000 00

Draft No.	152,	dated	M'ch 28, 1857,	payable	Oct. 31, 1857,	for	$2,000 00
"	153,	"	M'ch 28, 1857,	"	Oct. 31, 1857,	"	3,000 00
"	154,	"	M'ch 28, 1857,	"	Oct. 31, 1857,	"	2,000 00
"	162,	"	May 27, 1857,	"	Nov. 30, 1857,	"	5,000 00
"	189,	"	Dec. 21, 1857,	"	M'ch 24, 1858,	"	2,000 00
"	190,	"	Dec. 21, 1857,	"	M'ch 24, 1858,	"	5,000 00
"	163,	"	May 12, 1857,	"	Dec. 15, 1857,	"	5,000 00
"	174,	"	May 6, 1857,	"	Dec. 9, 1857,	"	5,000 00
"	177,	"	May 8, 1857,	"	Dec. 11, 1857,	"	5,000 00
"	170,	"	May 11, 1857,	"	Dec. 14, 1857,	"	3,000 00
"	173,	"	May 11, 1857,	"	Dec. 14, 1857,	"	2,000 00
"	168,	"	May 15, 1857,	"	Dec. 18, 1857,	"	5,000 00
"	171,	"	May 18, 1857,	"	Dec. 21, 1857,	"	5,000 00
"	172,	"	May 15, 1857,	"	Dec. 18, 1857,	"	3,000 00
"	176,	"	May 15, 1857,	"	April 18, 1858,	"	2,000 00
"	211,	"	Sept. 15, 1857,	"	April 18, 1858,	"	2,000 00
"	207,	"	Sept. 15, 1857,	"	June 18, 1858,	"	3,000 00
"	181,	"	Dec. 16, 1857,	"	Feb'y 19, 1858,	"	5,000 00
"	200,	"	Jan'y 18, 1858,	"	M'ch 20, 1858,	"	5,000 00
"	201,	"	Jan'y 18, 1858,	"	M'ch 20, 1858,	"	5,000 00
"	202,	"	Jan'y 18, 1858,	"	M'ch 20, 1858,	"	5,000 00
"	188,	"	Jan'y 2, 1858,	"	April 5, 1858,	"	2,000 00
"	215,	"	Feb'y 18, 1858,	"	May 21, 1858,	"	5,000 00
"	216,	"	M'ch 13, 1858,	"	June 16, 1858,	"	5,000 00
"	217,	"	M'ch 13, 1858,	"	May 16, 1858,	"	5,000 00
"	218,	"	M'ch 20, 1858,	"	May 23, 1858,	"	5,000 00
"	219,	"	M'ch 31, 1858,	"	June 3, 1858,	"	5,000 00
"	220,	"	April 16, 1858,	"	July 19, 1858,	"	3,000 00
"	194,	"	April 16, 1857,	"	Dec. 19, 1857,	"	2,094 00
"	195,	"	April 16, 1857,	"	Dec. 19, 1857,	"	2,094 00
"	196,	"	April 16, 1857,	"	Dec. 19, 1857,	"	2,094 00
"	198,	"	April 16, 1857,	"	Dec. 19, 1857,	"	2,094 00

That on said 22d day of June, 1858, the true amount of such indebtedness was unknown to your orators, Bishop and Stewart, but was supposed by them not to exceed the sum of about eighty-four thousand dollars, and that the mortgage hereinafter described was intended, among other things, to cover and be a security for the whole amount of such indebtedness then outstanding of every name and kind.

That, on said 22d day of June, 1858, said railroad company were also indebted to said Bishop & Co., on an unsettled account, in the sum of about eighty-four thousand dollars, being mostly for money loaned and advanced, and moneys paid, laid out, and expended by your orators, Bishop and Stewart, for said corporation, and at its instance and request, and the balance for labor and services rendered by them in constructing and equipping said railroad, procuring and paying for right of way, furnishing iron, locomotives, cars and other rolling stock, and other matters pertaining to and in and about the business of said corporation; that the amount of said indebtedness on said 22d day of June, 1858, was unknown and could not then be accurately determined, but was supposed by said corporation and your orators, Bishop and Stewart, to be about the sum of one hundred and three thousand dollars.

That, on settlement thereafter made, it was ascertained to be the sum of eighty-four thousand nine hundred and sixty-seven $\frac{7}{100}$ dollars.

Your orators further show unto your honor, that the said corporation, for the purpose of securing to said Bishop & Co. the amount actually due them as aforesaid on said unsettled account, and to secure to the several holders of said several drafts the payments thereof, for which said Bishop & Co. were liable as endorsers, and to save said Bishop & Co. harmless therefrom, did, on the 22d day of June, in the year 1858, execute, under the common seal of said corporation, and deliver to your orators, Ethan F. Bishop and John W.

6 Stewart, copartners of the firm of Bishop & Co., a certain indenture of mortgage, bearing date on the 22d day of June, in the year 1858; and in and by said mortgage, said corporation, for and in consideration of the sum of one dollar, therein expressed to be paid by your orators, Ethan F. Bishop and John W. Stewart, to said corporation for the purpose of securing the moneys thereinafter mentioned, as owing by said corporation to said Bishop & Co., and indemnifying and saving them harmless from and against all liability as surety or sureties for said corporation, (being the indebtedness and endorsements above mentioned and specified,) did give, grant, bargain, sell, convey and confirm unto your orators, Ethan F. Bishop and John W. Stewart, their heirs, executors, administrators and assigns, all the franchises and property of said corporation, real and personal, in the State of Wisconsin, including its railroad, extending from the State line, through the cities of Kenosha and Racine, to its terminus in the city of Milwaukee, together with all the right of way of said railroad, and all structures and buildings thereon now erected or hereafter to be constructed, including all depot grounds and depot buildings, turnouts and privileges, all wood along the line of said railroad, all engines, cars, and all other property and rights of property now belonging to said company, or hereafter to be acquired, except money on hand and debts due to said company. That said mortgage conveyed said premises to your orators, Bishop and Stewart, to have and to hold the said premises, real and personal property aforesaid, and appurtenances, rights and privileges, unto the said Bishop and Stewart, their heirs, executors, administrators, and assigns forever.

That said mortgage then recited that said corporation was

7 indebted to your orators, Bishop and Stewart, in the sum of one hundred and three thousand dollars, on account, being mostly for moneys loaned and advanced, and moneys paid, laid out, and expended by the said Bishop and Stewart for said corporation, and at its instance and request, and in and about the construction of the line of railroad of said corporation.

That your orators, Bishop and Stewart, as copartners as aforesaid, had endorsed certain promissory notes, drafts, and acceptances made by said corporation, and were liable as sureties on promissory notes, drafts, acceptances, and contracts, in which the said corporation was the principal debtor to a large amount, to wit, in about the sum of eighty-four thousand dollars in all, and that it was contemplated and expected that such promissory notes, drafts, acceptances, and con-

tracts, on which your orators, Bishop and Stewart, were sureties for said corporation, would be from time to time extended or renewed, and that your orators, Bishop and Stewart, would be sureties on the notes or contracts given in renewal thereof.

In consideration of which, it was in and by said mortgage declared and provided, that the same was made upon the trust and condition, that if said corporation should well and truly pay to your orators, Bishop and Stewart, their heirs, executors, administrators, or assigns, the said sum of one hundred and three thousand dollars, with interest, and should well and truly pay to your orators, Bishop and Stewart, their executors, administrators, or assigns, such promissory note or notes, drafts, bills of exchange, or acceptances, as may be given by said corporation to your orators, Bishop and Stewart, for or on account of the said sum of one hundred and three thousand dollars, or any part or portion thereof; and should also well and truly indemnify and save harmless your orators, Bishop and Stewart, of, from, and against
8 all suits, actions, damages, and liabilities occasioned, caused, sustained, or incurred as such sureties aforesaid, or by reason of their being such sureties, and against all liability as surety or sureties on any note or notes, contract or contracts, hereafter given or to be given in extension or renewal of any debt or debts for which they are now liable as sureties, then the said mortgage to be void; otherwise, to remain in full force, effect, and virtue.

That said mortgage further provided that it was understood and agreed that the sum of one hundred and three thousand dollars above mentioned, as being due and owing from said corporation to your orators, Bishop and Stewart, was the sum then actually due and owing, as near as it could be ascertained without a full and complete statement of account between the parties, and such sum was to be either increased or diminished so as to correspond with the actually due, as it might be found and ascertained on final settlement.

And the said plaintiffs further show, that said mortgage expressly provided that on the 23d day of June, 1858, said corporation should deliver possession to your orators, Bishop and Stewart, of the entire railroad track of said corporation, extending from the depot in the city of Milwaukee to the southern line of the State of Wisconsin, together with its side tracks, depot grounds, depots, and all buildings, tenements, turnouts, cars, engines, rolling stock, fixtures, and appurtenances, of whatsoever nature and kind, and of all the property described in said mortgage, to be by your orators, Bishop and Stewart, held, used, operated, as herein mentioned, subject, however, to all their existing contracts and agreements with any other railroad company whose railroad connects with the road of said corporation.

That it was further provided, that your orators, Bishop and
9 Stewart, after receiving possession of said railroad and its appurtenances, and the other mortgaged property, should continue in possession thereof until said mortgage should be foreclosed, or the right of your orators, Bishop and Stewart, to such possession should cease, pursuant to the terms of said mortgage, and that your orators, Bishop and Stewart, during the time of such possession, should operate said railroad in such manner as would produce the largest

amount of net receipts, and should receive the tolls, income, and profits thereof.

That your orators, Bishop and Stewart, should, during the time they were in possession of said road, keep the same and all the rolling stock thereon in good repair, and should receive and appropriate, in the manner thereafter provided, all the receipts and income to be derived from the operation of said road.

That your orators, Bishop and Stewart, might, if it should become necessary, or if they should deem best, purchase additional rolling stock for the use of said road, and appropriate moneys received from the operation of the same to and for the payment thereof.

Your orators further show that in and by said mortgage your orators, Bishop and Stewart, covenanted and agreed that they would defray all the current costs and expenses of keeping said railroad and rolling stock in good and thorough repair, and all the expenses of operating said road, including damages, if any, to persons and property, and that they would, during or by the last day of each and every month, make out and deliver to said corporation a correct statement, exhibiting the total receipts and income of said road from all sources during the next preceding month, also the costs
10 and expenses during such month of rolling stock purchased, and of keeping said road and rolling stock in repair, also exhibiting the net receipts from said railroad after deducting such costs and expenses of rolling stock and repairs and of operating said road, and at any time, on demand of said corporation, would furnish a statement in detail of the items of which such monthly statements were composed.

Your orators further show that said mortgage provided that the net receipts, after deducting the costs and expenses of the repairs and of rolling stock purchased, and of operating said road as exhibited by the monthly statements aforesaid, should be appropriated by them in the manner following, to wit:

First. To the payment of all interest which should thereafter become due upon four hundred thousand dollars of the bonds of the said corporation, secured by a first mortgage or deed of trust upon the stock and franchises of said corporation, and all its property, real and personal, which mortgage or deed of trust bears date October 5th, 1853, and was made by said corporation by the name of the Green Bay, Milwaukee, and Chicago Railroad Company to Francis A. Palmer, of the city of New York, trustee, &c.

Second. To the payment of all coupons hereafter to become due on two hundred thousand dollars of bonds issued by the city of Milwaukee to said corporation and secured by a second mortgage or deed of trust on said railroad and its appurtenances, and which second mortgage bears date the day .

Third. Whatever balance of said net proceeds should remain after the payment of the interest thereafter to become due on the debts secured by said first and second mortgages or deeds in trust, should be applied by your orators, Bishop and Stewart, to the pay-
11 ment of the sum or sums of money due or thereafter to

become due from said corporation, and which were secured by said mortgage, or to the payment of any debt or debts for which your orators, Bishop and Stewart, were liable as sureties of said corporation, or might thereafter become liable for, by reason of endorsing or signing any note or contract given in extension or renewal of any indebtedness of said corporation for which your orators, Bishop and Stewart, were then liable.

And said mortgage provided that your orators, Bishop and Stewart, might at their discretion apply such balance of said net receipts on the indebtedness of said company to them, on the promissory notes or drafts given for the whole or any part of such indebtedness, or on debts owing by said corporation for which they were surety, or part upon one and part upon the other, and that whenever the sum or sums of money, debt or debts mentioned in the condition of said mortgage should be fully paid and satisfied, and said corporation should in all respects have indemnified and saved harmless your orators, Bishop and Stewart, from and against any and all liability as sureties as aforesaid, and should have in all respects performed and fulfilled the conditions of said mortgage, that then they would deliver possession to said corporation of said railroad and its appurtenances, and of all the property therein and thereby mortgaged, and of such property as might be by them purchased and paid for out of the receipts or income of said road, except such as might be worn out, destroyed, or consumed in the operation of said railroad.

Your orators further show that said mortgage provided that
12 your orators, Bishop and Stewart, might, if they should deem it best, pay out of the receipts of said road any sums of money necessary to acquire or perfect the right of way to any part of the track or depot grounds of said road, also any damages for which said corporation is liable for injuries theretofore done to persons or property, and also any sum of money owing by said corporation for expenses of operating said road, also that the money then under the control of said corporation, being some seven or eight thousand dollars, should be applied to the payment of the current operating expenses of said corporation, balances, if any, due to connecting railroads, and any interest which may become due on the first day of July, 1858, on the debt or debts secured by said first and second mortgages.

Your orators further show that said mortgage was duly sealed with the common seal of the said the Milwaukee and Chicago Railroad Company, and attested by the signature thereto of C. B. Hall, its president, and that the same was duly executed by your orators, Bishop and Stewart, and that the execution of the said mortgage by the said corporation, and your orators, Bishop and Stewart, was duly proved before an officer authorized to take such proof, so as to entitle it to be recorded in the State of Wisconsin, and that the said mortgage was thereupon duly recorded in the office of the register of deeds of the county of Milwaukee, on the 24th day of June, 1858, in volume 43 of mortgages, on pages 456, '57, '58, '59, and '60, in the register's office of Racine county, on the 28th day of June, 1858, in volume

"Z" of mortgages, on pages 47, 48, 49, and 50, and in the register's office of Kenosha county, on the 29th day of June, 1858, in volume "G" of mortgages, on pages 415, 416, 417, and 418.

13 Your orators further show that on the 2d day of August, 1858, your orators, Bishop and Stewart, had an accounting and settlement with said corporation of and concerning the unsettled account above mentioned, and that on such settlement there was found due your orators, Bishop and Stewart, on the 22d day of June, 1858, the sum of eighty-four thousand nine hundred and sixty-seven $\frac{7}{100}$ dollars. And your orators show that that sum was actually and justly due your orators, Bishop and Stewart, on said account, on the day of the execution of the mortgage aforesaid, and that said mortgage was given for and intended by said corporation as a security for that amount to your orators, Bishop and Stewart, in addition to the sums contained in the said several drafts, notes, and bills of exchange above set forth.

That on the 2d day of August, 1858, the said corporation made its twenty-five several drafts, drawn by said company on their local treasurer in the city of New York, payable to the order of Bishop & Co., with interest, at the office of the company in New York, which drafts were afterwards accepted by said local treasurer, and were of the several dates, numbers, and amounts, and payable at the times, hereinafter named, respectively, to wit:

Draft No.	1,	dated	July	15,	1858,	for	$5,000,	payable	Sept. 18, 1858.
"	2,	"	"	"	"		5,000,	"	" 18, "
"	3,	"	"	"	"		5,000,	"	Oct. 18, "
"	4,	"	"	"	"		5,000,	"	" 18, "
"	5,	"	"	"	"		5,000,	"	Nov. 18, "
"	6,	"	"	"	"		5,000,	"	" 18, "
"	7,	"	"	"	"		5,000,	"	Dec. 18, "
"	8,	"	"	"	"		5,000,	"	" 18, "
"	9,	"	"	"	"		5,000,	"	Jan'y 18, 1859.

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"	10,	"	"	"	"		4,063 94,	"	" 18, "
"	14,	"	"	16,	"		1,000,	"	Nov. 19, 1858.
"	15,	"	"	"	"		1,000,	"	" 19, "
"	16,	"	"	16,	"		1,000,	"	" 19, "
"	17,	"	"	16,	"		1,000,	"	" 19, "
"	18,	"	"	16,	"		1,000,	"	" 19, "
"	19,	"	"	16,	"		2,000,	"	" 19, "
"	20,	"	"	16,	"		2,000,	"	" 19, "
"	21,	"	"	16,	"		2,000,	"	" 19, "
"	22,	"	"	16,	"		2,000,	"	" 19, "
"	23,	"	"	16,	"		3,000,	"	Dec. 19, "
"	24,	"	"	16,	"		3,000,	"	" 19, "
"	25,	"	"	16,	"		3,000,	"	" 19, "
"	26,	"	"	16,	"		3,000,	"	" 19, "
"	27,	"	"	16,	"		5,000,	"	Jan'y 19, 1859.
"	28,	"	"	16,	"		5,000,	"	" 19, "

And that on said 2nd day of August, 1858, said drafts, so executed, were delivered by said corporation to your orators, Bishop and Stewart, for and on account and in liquidation of the said sum of eighty-four thousand nine hundred and sixty-seven $\frac{72}{100}$ dollars, so as aforesaid found due your orators, Bishop and Stewart, on the said 22nd day of June, 1858, on the account aforesaid, and that said acceptances were then endorsed by your orators, Bishop and Stewart, and by them passed to divers persons, who became the owners and holders thereof.

And your orators further show that said promissory notes, bills of exchange, drafts, and acceptances, so as aforesaid given by said corporation, and outstanding on the said 22nd day of June, 1858, together with the drafts of said corporation, so as aforesaid given for, and on account, and in liquidation, of the account so as aforesaid due your orators, Bishop and Stewart, on the said 22nd day of June, 1858, (excepting draft No. 29, which was paid at maturity,) were at maturity renewed by said corporation by new notes, drafts, acceptances, or bills of exchange, drawn by said corporation, and endorsed by your orators, Bishop and Stewart by the name of Bishop & Co.; that on some of said drafts interest was paid when renewed, and on others interest was not paid, but added to the principal of the new note, draft, acceptance, or bill of exchange, which said renewals were made from time to time as said drafts matured, which said several renewals appear upon the books of said corporation, and to which your orators pray leave to refer should it become necessary; and that on the 22nd day of August, 1861, there was outstanding against said corporation, and endorsed by said Bishop & Co., as renewals and continuations of said promissory notes, drafts, bills of exchange, and acceptances, the several acceptances or accepted drafts, hereinafter named and described, and held by the parties whose names appear opposite the same, respectively, to wit:

Nos. of drafts.	Date.	Time payable.	Principal.	By whom held.
No. 157	July 25, 1859	Nov. 28, 1859	$2,000 00	Salem H. Wales.
158	July 25, 1859	Nov. 28, 1859	2,000 00	Do.
159	July 25, 1859	Nov. 28, 1859	2,000 00	Do.
170	Aug. 5, 1859	Dec. 8, 1859	2,985 13	Do.
236	March 31, 1860	Aug. 3, 1859	1,373 35	Do.
237	March 31, 1860	Aug. 3, 1859	1,000 00	Do.
239	Dec. 27, 1859	April 30, 1860	21,338 09	Do.
127	May 21, 1859	Oct. 24, 1859	5,000 00	Morris K. Jesup.
129	May 22, 1859	Oct. 25, 1859	3,000 00	Do.
130	May 22, 1859	Oct. 25, 1859	3,000 00	Do.
131	May 22, 1859	Oct. 25, 1859	3,000 00	Do.
132	May 22, 1859	Oct. 25, 1859	3,000 00	Do.
138	June 27, 1859	Sept. 30, 1859	5,000 00	Do.
139	June 27, 1859	Sept. 30, 1859	5,000 00	Do.
161	July 24, 1859	Oct. 27, 1859	5,000 00	Do.
162	July 24, 1859	Oct. 27, 1859	5,000 00	Do.
234	March 31, 1860	Aug. 3, 1860	1,000 00	Do.
221	Feb'y 24, 1860	Aug. 27, 1860	5,242 08	Schuchardt & Gebhard.

Nos. of drafts.	Date.	Time payable.	Principal.	By whom held.
No.222	Feb'y 24, 1860	Aug. 27, 1860	$5,240 13	Schuchardt & Gebhard.
223	Feb'y 24, 1860	Aug. 27, 1860	2,094 89	Do.
224	Feb'y 24, 1860	Aug. 27, 1860	3,142 33	Do.
225	Feb'y 24, 1860	Aug. 27, 1860	3,140 00	Do.
226	Feb'y 24, 1860	Aug. 27, 1860	2,093 33	Do.
227	Feb'y 24, 1860	Aug. 27, 1860	10,463 74	Do.
146	July 21, 1859	Jan'y 24, 1860	4,063 94	Farmers' Bank.
147	July 22, 1859	Jan'y 25, 1860	5,000 00	Do.
148	July 22, 1859	Jan'y 25, 1860	5,000 00	Do.
149	July 24, 1859	Jan'y 27, 1860	5,000 00	Do.
150	July 24, 1859	Jan'y 27, 1860	5,000 00	Do.
193	Nov. 28, 1859	March 31, 1860	1,000 00	Do.
85	Jan'y 18, 1859	July 21, 1859	5,000 00	William D. Bishop.
128	May 21, 1859	Oct. 24, 1859	5,000 00	Do.
209	Dec. 30, 1859	May 3, 1860	3,000 00	The Corn Exchange Bank.
247	May 16, 1860	Aug. 19, 1860	4,517 88	Estate of Lee Canfield, deceased.
248	May 16, 1860	Aug. 19, 1860	4,517 88	S. S. Robins.
231	Feb'y 13, 1860	----------	10,000 00	Artisans' Bank.
245	May 28, 1860	Aug. 31, 1860	2,000 00	Charles Palmer.
244	May 17, 1860	Aug. 20, 1860	2,442 75	The Patterson Iron Co.
241	April 5, 1860	July 8, 1860	5,323 33	Pequonnoc Bank.
235	March 31, 1860	Aug. 3, 1860	2,000 00	Vose, Perkins & Co.
191	Oct. 20, 1859	----------	626 65	W. Jamieson
252	May 6, 1861	Aug. 9, 1861	32,254 62	American Exchange Bank.
254	May 6, 1861	Aug. 9, 1861	16,932 84	Iron Bank.

17 Also, an acceptance for $5,000, dated February 6th, 1857, which has been merged in a judgment in one of the courts of the State of New York in favor of your orator, J. W. Lewis, but in what court or at what time said judgment was rendered, or what is the exact amount thereof, your orators are unable to say.

And your orators further show, that each and every one of the drafts last above described were given by said corporation and endorsed by said Bishop & Co., in renewal and continuation of the said indebtedness described in the mortgage so as aforesaid executed and delivered to your orators, Bishop and Stewart, by said corporation, on the 22nd day of June, 1858, and secured thereby; and your orators claim and insist that the said mortgage so given to your orators, Bishop and Stewart, and held by them, is a security for the drafts last above described, and that your orators, as holders and owners of said drafts, are entitled to the benefit of said security, and entitled to have the same enforced, and the equity of redemption of said corporation to said mortgaged premises foreclosed.

Your orators further show, that drafts numbers 126 and 178 were, at maturity, renewed by one draft for the amount of both, and that said last-mentioned draft was renewed from time to time, and that the last renewal thereof was by draft number 231, dated February 13th, 1860, and due three months from date; that said last-mentioned draft is now held by Charles L. Frost, a citizen of the State of New York, who has declined to unite with your orators as complainant, and, by reason of his citizenship of said State of New York, cannot be

made a defendant; that on the 17th day of June, 1861, the said Charles L. Frost commenced an action on the law side of this court on said last-mentioned draft, and that action so commenced is
18 now pending and undetermined in this court.

Your orators further show, that draft number 16 was last renewed by number 191, dated October 20th, 1859, payable in four months; that it has been in part paid, and that there is now due thereon about the sum of $626\frac{85}{100}$, and that it is now held by your orator, W. Jamieson, and that no proceedings at law have been had thereon.

Your orators further show, that in the month of August, 1861, the holders of all said drafts (except the three last above named) now outstanding against said corporation, and endorsed by your orators, Bishop and Stewart, as aforesaid, commenced suits on the drafts held by them, respectively, on the law side of this honorable court, and that thereafter such proceedings were had in said second suits that the said holders of said drafts, on the the 2d day of September, 1861, by the consideration and judgment of this court, recovered their several judgments in said suits against said corporation for the amount of the said drafts so held by them, respectively, together with costs; and that said several judgments were in favor of the parties and for the amounts following, to wit:

Judgment of	$17,026	27	in favor of	Iron Bank.
"	28,788	95	"	Farmers' Bank.
"	4,944	95	"	S. S. Robbins.
"	2,681	68	"	The Patterson Iron Company.
"	32,416	57	"	American Exchange Bank.
"	2,194	59	"	Charles Palmer.
"	11,733	67	"	William D. Bishop.
"	3,369	21	"	Corn Exchange Bank.
"	5,865	82	"	Pequonnoc Bank.
"	36,775	27	"	Salem H. Wales.
"	42,729	50	"	Morris K. Jesup.
19 "	1,116	56	"	Morris K. Jesup.
"	34,787	09	"	Frederick Schuchardt, Frederick G. Gbehard, and Frederick Gebhard Schuchardt.
"	4,944	95	"	W. J. Canfield, administrator of the estate of Lee Canfield, deceased.
"	2,217	23	"	Francis Vose, Charles L. Perkins, and John B. Kettell.

That afterwards, and on or about the 5th day of October, A. D. 1861, the plaintiffs in said judgments, respectively, sued out of said court a writ of fieri facias in due form of law, and afterwards, and on the day and year last aforesaid, delivered the same to the marshal to whom they were directed to be executed according to law, first directing said marshal (your endorsement upon each of said executions signed by the attorneys for the plaintiffs in said judgments) not to

levy upon any of the property mentioned and described in the mortgage hereinafter set forth; that afterwards, and on or about the 7th day of October, A. D. 1861, the said marshal returned upon each of said executions that no property could be found to satisfy the same or any part thereof; that said several judgments still remain in full force, unserved and unsatisfied in whole or in part, and that no other or further proceedings at law have been taken thereon.

And your orators further show, that on the 22d day of June, 1858, your orators, Bishop and Stewart, as trustees as aforesaid, took possession of said railroad and appurtenances, together with all the mortgaged property as mortgagees aforesaid, and since that time have continued to hold the same as such mortgagees, (except a short time during the year 1860, while the same was in the hands of
20 C. B. Hall, as receiver, appointed by this court,) and that they are now in possession thereof as such mortgagees.

That you orators, Bishop and Stewart, have applied and appropriated the earnings of said road and mortgaged property in pursuance of the terms and conditions of said mortgage, and that the whole amount of said earnings have been absorbed in payments made under said mortgage on claims prior to the demands of your orators; except a small amount which has been applied in payment of interest on the demands of your orators, and that there is now actually due your orators, on the demands secured by said mortgage, the sum of two hundred and forty-seven thousand two hundred and thirty-seven dollars and eighty-six cents, besides interest which has accrued thereon, and which your orators cannot now precisely ascertain, over and above all amounts received by said Bishop and Stewart as mortgagees as aforesaid, under said mortgage, applicable to the payment of your orators' claims as aforesaid.

That no proceedings at law have been taken to collect any of said demands, except what is above set forth, and that said corporation has no property, other than that contained in said mortgage, out of which your orators could make their said debts, and that your orators have severally the interest in said mortgaged premises above set forth.

Your orators therefore pray that usual decree may be made for the sale of the mortgaged premises aforesaid, and for the payment of the amount due to your orators for principal and interest upon the said mortgage as hereinbefore set forth, together with their costs in this suit.

And that the said defendants, Milwaukie & Chicago Railroad Company, and all persons claiming under them subsequent to the
21 commencement of this suit, or who have any liens by judgment or decree, or otherwise, upon the mortgaged premises subsequent to the said mortgage to your orators, Bishop and Stewart, or any liens or claims thereon by or under any such subsequent judgment or decree, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all equity of redemption in the said mortgaged property, and that your orators may have such other or further relief as the nature of the case may require, and as to this court may seem proper and agreeable to equity.

May it please this court to grant to your orators a writ of subpœna, commanding the said Milwaukee and Chicago Railroad Company, by a certain day, and under a certain penalty, to be and appear before this honorable court, and then and there to answer the premises; and further, to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience. And your orators shall ever pray, &c.

E. FERRIS BISHOP,
JOHN W. STEWART,
IRON BANK,
FARMERS' BANK,
PEQUONNOC BANK,
THE PATTERSON IRON COMPANY,
S. S. ROBBINS,
WILLIAM D. BISHOP,
W. J. CANFIELD, *Administrator, &c.*,
CHARLES PALMER,
FREDERICK SCHUCHARDT,
FREDERICK C. GEBHARD,
FREDERICK GEBHARD SCHUCHARDT,
FRANCIS VOSE,
CHARLES L. PERKINS,
JOHN B. KETTEL,
MORRIS K. JESUP,
SALEM H. WALES,
J. W. LEWIS,
By CARY & PRATT,
Their Solicitors.
AMERICAN EXCHANGE BANK,
CORN EXCHANGE BANK,
By CARY & PRATT,
Their Solicitors.
CARY & PRATT,
Solicitors and As. Counsel for Complainants.

Whereupon a subpœna issued as follows:

22 *Whereupon a subpœna issued as follows:*

23 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America to Milwaukee and Chicago Railroad Company, greeting:

You are hereby commanded, that you personally appear before the judge of the district court of the United States of America for the district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of November next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court by E. Ferris Bishop and John W. Stewart, trustees, Iron Bank, Farmers' Bank, Pequonnoc Bank, the Patterson Iron Company, S. S. Robbins, William D. Bishop, W. J. Canfield, adminis-

trator, &c., Charles Palmer, Frederick Schuchardt, Frederick C. Gebhard, Frederick Gebhard Schuchardt, Francis Vose, Charles L. Perkins, John B. Kettell, Morris K. Jesup, Salem H. Wales, J. W. Lewis, W. Jamieson, American Exchange Bank, and Corn Exchange Bank.

And to do further, and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said Milwaukee and Chicago Railroad Company, if to be found in his district, and due return thereof made.

Witness the honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin, at the city Milwaukee, in the said district, this fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty-one, and of our independence the eighty-sixth.

J. M. MILLER, *Clerk.*
CARY & PRATT, *Solicitors.*

It is ordered by our said court that the said Milwaukee and Chicago Railroad Company, the defendant aforesaid, do enter its appearance in this suit in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise, the bill filed may be taken as confessed.

24 And afterward, before, on the return day of said writ, came the said marshal, and returned the same with his return endorsed thereon, as follows:

Return.

"Served on the within Milwaukee and Chicago Railroad Company by deliverer, A. V. H. Carpenter, secretary, personally, a copy of this subpœna this 15th day of October, 1861.

"D. C. JACKSON,
"*Marshal.*"

Fees, $2 46.

And afterwards, on the 4th day of November, 1861, came the defendant, by its solicitor, Mr. Hooker, and filed its appearance as follows:

Appearance.

District court of the United States for the district of Wisconsin.

E. FERRIS BISHOP, JOHN W. STEWART, *et al.*, *vs.* MILWAUKEE and CHICAGO RAILROAD COMPANY. } In equity.

NOVEMBER 4, 1861.

You will please enter the appearance of the defendant in the above-entitled cause by myself, as its solicitor.

D. G. HOOKER,
Def't's Solicitor.

To J. M. MILLER, *Clerk*, &c.

And same day (November 4th, 1861) came the said complainants, by their said solicitors, and entered a rule on the defendants to plead as follows:

25 *Rule to plead.*

1ST MONDAY OF NOVEMBER, 1861.

E. FERRIS BISHOP and J. W. STEWART, trustees, &c., *et al.*, *vs.* MILWAUKEE and CHICAGO RAILROAD COMPANY. } In equity.

On motion of Cary & Pratt, complainants' sol's, ordered that the defendant appear and plead, answer, or demur to the complainants' bill of complaint on file, by the first Monday of December next.

CARY & PRATT,
Complainants' Solicitors.

December 2, 1861. This day came Charles L. Frost, by his counsel, Mr. Ogden, and presented to the court his petition as follows:

Petition of Charles L. Frost.

District court of the United States, district of Wisconsin.

E. FERRIS BISHOP and JOHN W. STEWART, and others, *vs.* MILWAUKEE and CHICAGO RAILROAD COMPANY. } In equity.

The petition of Charles L. Frost, by Thomas L. Ogden, his solicitor, shows to this court that your petitioner, being the legal holder and assignee of a certain bill of exchange, dated at Milwaukee, February 13th, 1860, for ten thousand dollars, and interest at seven per cent. per annum, drawn by the Milwaukee and Chicago Railroad Company, at three months after date, to the order of A. V. H. Carpenter, secretary, on A. J. F. Vanderventer, assistant treas-
26 surer, 44 Exchange Place, New York, which said bill was duly endorsed by the said A. V. H. Carpenter, secretary, and accepted by the said A. J. F. Vanderventer, assistant treasurer, and was afterwards duly protested for non-payment, commenced an action against the said Milwaukee and Chicago Railroad Company in this court, on the law side thereof, to recover the amount specified in the said bill of exchange and interest; and that, afterwards, on the second day of December, 1861, judgment was duly rendered in the said action for the sum of $11,262 76, damages and costs; all of which by the record in this court will fully appear.

Your petitioner further states that this suit has been instituted to foreclose a certain mortgage executed by the said Milwaukee and Chicago Railroad Company to the said E. Ferris Bishop and John W. Stewart, as trustees, to secure the payment of divers bills of exchange, of which the said bill of exchange hereinbefore set forth is

one, and the others of which are held, as your petitioner is informed, by the other parties named as complainants in this suit; and that the interest of your petitioner, and of the said other complainants, in the said mortgage, is identical in proportion to the amounts held by the complainants, respectively.

Your petitioner therefore prays that he may, by an order of this court, be made a party complainant to this suit in the same manner as if he had originally been named as such party. And your petitioner will ever pray, &c.

THOMAS L. OGDEN,
Sol. for Petitioner.

27 And now, at this same term, (November term, 1861,) on the eighteenth day thereof, to wit, on the fifth day of December, A. D. 1861, the following proceedings were had, to wit:

Pro. confesso Ref. to master.

E. FERRIS BISHOP and JOHN W. STEWART, trustees, *et als.*,
vs.
MILWAUKEE and CHICAGO RAILROAD COMPANY. } In equity.

This day came the complainants, by their counsel, and it being made to appear that the defendant has failed to plead, answer, or demur to the bill of complaint in this cause, on motion, it is ordered by the court that the said bill, and all things therein contained, be, and hereby is, taken as confessed.

This day this cause came on to be heard upon the bill taken as confessed, and thereupon, upon consideration thereof, it is ordered by the court that the record and papers of this cause be referred to a master of this court to compute, ascertain, and report the amount due the said complainants.

And came Edward Kurtz, esq., the master to whom it was referred, and made report that the sum of two hundred and fifty-four thousand one hundred and seventy-five dollars is found due the said complainants, as follows:

Report of master.

District court of the United States for the district of Wisconsin.

E. FERRIS BISHOP and JOHN W. STEWART, trustees, Iron Bank, Farmers' Bank, *et als.*,
vs.
MILWAUKEE and CHICAGO RAILROAD COMPANY. } In equity. — Chancery M., page 245.

To the judge of the district court of the United States of America for the district of Wisconsin:

28 In pursuance and by virtue of an order of this court, made in the above cause, and bearing date the fifth day of December, in the year of our Lord one thousand eight hundred and sixty-one, by which it was referred to me, being one of the masters of this court, to

compute, ascertain, and report the amount due to the complainants for the principal and interest on the judgments and acceptances and mortgage mentioned and set forth in the bill of complaint filed in this cause. I do respectfully certify and report that I have been accompanied by the counsel for the complainants, and have computed and ascertained the sum of two hundred and fifty-four thousand one hundred and seventy-five dollars ($254,175 00) to be the amount due the complainants in the cause on the said judgments and acceptances and mortgage, for the principal and interest up to and including the date of this my report.

And I do further certify and report that the schedule hereunto annexed, marked "A," and making a part of this my report, contains a statement and account of the principal and interest moneys due to the complainants as aforesaid, the period of the computation of the interest and its rates, and to which for greater certainty I refer. All of which is respectfully submitted.

December 5th, 1861.

EDWARD KURTZ,
Master in Chancery.

Schedule A referred to in the preceding report.

Judgments recovered by the several complainants respectively on the second day of September, 1861, as follows:

In favor of Frederick Schuchardt, Frederick C. Gebhard, and Frederick Gebhard Schuchardt, for	$34,769 33	
Interest from Sep. 2, 1861, to Dec. 5, 1861—3 m. 3 d. at 7 per cent	628 74	
Costs taxed, $17 76, and marshal's fees on *fi. fa.* $1 00	18 76	
		$35,416 83
29 In favor of Farmers' Bank for	$28,771 25	
Interest from Sep. 2, 1861, to Dec. 5, 1861—3 m. 3 d. at 7 per cent	520 28	
Costs taxed, $17 70, and marshal's fees on *fi. fa.* $1 00	18 70	
		$29,310 23
In favor of American Exchange Bank for	$32,398 87	
Interest from Sep. 2, 1861, to Dec. 5, 1861—3 m. 3 d. at 7 per cent	585 88	
Costs taxed, $17 70, and marshal's fees on *fi. fa.* $1 00	18 70	
		$33,003 45
In favor of Salem H. Wales for	$36,757 57	
Interest from Sep. 2, 1861, to Dec. 5, 1861—3 m 3 d. at 7 per cent	664 69	
Costs taxed, $17 70, and marshal's fees on *fi. fa.* $1 00	18 70	
		$37,440 96

In favor of Morris K. Jesup for	$42,711 80	
Interest from Sep. 2, 1861, to Dec. 5, 1861 —3 m. 3 d. at 7 per cent.	772 36	
Costs taxed, $17 70, and marshal's fees on *fi. fa.* $1 06	18 76	
		$43,502 92
In favor of Iron Bank for	$17,008 57	
Interest from Sep. 2, 1861, to Dec. 5, 1861 —3 m. 3 d. at 7 per cent.	307 56	
Costs taxed, $17 70, and marshal's fees on *fi. fa.* $1 00	18 70	
		$17,334 83
In favor of William D. Bishop for	$11,715 97	
Interest from Sep. 2, 1861, to Dec. 5, 1861 —3 m. 3d. at 7 per cent.	211 86	
Costs taxed, $17 70, and marshal's fees on *fi. fa.* $1 00	18 70	
		$11,946 53
In favor of S. S. Robbins for	$4,927 25	
Interest from Sep. 2, 1861, to Dec. 5, 1861 3 m. 3 d. at 7 per cent.	89 10	
Costs taxed, $17 70, and marshal's fees on *fi. fa.* $1 00	18 70	
		$5,035 05
In favor of Pequonnoc Bank for	$5,848 12	
Interest from Sep. 2, 1861, to De. 5, 1861 —3 m. 3 d. at 7 per cent.	105 75	
Costs taxed, $17 70, and marshal's fees on *fi. fa.* $1 00	18 70	
		$5,972 57
In favor of Corn Exchange Bank for	$3,352 01	
Interest from Sep. 2, 1861, to Dec. 5, 1861, at 7 per cent.	60 62	
Costs taxed, $17 70, and marshal's fees on *fi. fa.* $1 00	18 70	
		$3,431 33
In favor of Charles Palmer for	$2,177 39	
Interest from Sep. 2, 1861, to Dec. 5, 1861, at 7 per cent.	39 38	
Costs taxed, $17 70, and marshal's fees on *fi. fa.* $1 00	18 70	
		$2,235 47
In favor of Morris K. Jesup for	$1,099 36	
Interest from Sep. 2, 1861, to Dec. 5, 1861, at 7 per cent.	19 87	
Costs taxed, $17 70, and marshal's fees on *fi. fa.* $1 00	18 70	
		$1,137 93

30	In favor of the Patterson Iron Company for	$2,664 42	
	Interest from Sep. 2, 1861, to Dec. 5, 1861, at 7 per cent.	48 18	
	Costs taxed, $17 76, and marshal's fees *fi. fa.* $1 00	18 76	
			$2,731 36
	In favor of W. J. Canfield, administrator, &c.	$4,927 25	
	Interest from Sept. 2, 1861, to Dec. 5, 1861, at 7 per cent.	89 10	
	Costs taxed, $17 70, and marshal's fees on *fi. fa.* $1 00	18 70	
			5,035 05
	In favor of Francis Vose, Charles L. Perkins, and John B. Kettell for	2,199 47	
	Interest from Sep. 2, 1861, to Dec. 5, 1861, at 7 per cent.	39 78	
	Costs taxed, $17 76, and marshal's fees on *fi. fa.* $1 06	18 82	
			2,258 07
	In favor of Charles L. Frost, dated Dec. 2, 1861, for	11,262 76	
	Interest from Dec. 2, 1861, to Dec. 5, 1861 —3 d. at 7 per cent.	6 50	
	Costs taxed	26 36	
			11,295 62
	Also two claims which have not been merged into judgment, as follows:		
	Amount due the complainant J. W. Lewis, as appears from the testimony of A. V. H. Carpenter herewith filed		6,366 94
	Amount due the complainant W. Jamieson, as appears from the testimony of A. V. H. Carpenter		719 86
	Total amount due the several complainants		$254,175 00

Milwaukee, December 5th, 1861.

EDWARD KURTZ,
Master in Chancery.

Mortgage.

And the mortgage referred to in said report of the master and in the bill of complaint is as follows:

Articles of agreement made and entered into, this twenty-second day of June, in the year one thousand eight hundred and fifty-eight, by and between the Milwaukee and Chicago Railroad Company, a corporation duly created and existing under and by virtue of the laws of the State of Wisconsin, party of the first part, and

Ethan F. Bishop and John W. Stewart, copartners under the firm and name of Bishop & Co., parties of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, the receipt of which is acknowledged, and for the purpose of securing the payment of the moneys hereinafter mentioned, as owing by said party of the first part to said parties of the second part, and to indemnify and save them harmless from and against all liability as surety or sureties for said party of the first part, doth give, grant, bargain, sell, convey and confirm unto said parties of the second part, their heirs, executors, administrators or assigns, all the franchises and property of said corporation, real and personal, in the State of Wisconsin, including its railroad, extending from the State line through the cities of Kenosha and Racine to its terminus, in the city of Milwaukee, together with all the right of way of said railroad, and all structures and buildings thereon, now erected or hereafter to be constructed, including all depot grounds and depot buildings, turnouts and privileges, all wood along the line of said railroad, all engines, cars, and all other property and rights of property now belonging to said company, or hereafter to be acquired, except money on hand and debts due to said company:

To have and to hold the said premises, real and personal property aforesaid, and appurtenances, rights and privileges, unto the said parties of the second part, their heirs, executors, administrators and assigns forever.

The conditions of these presents is such, that whereas the said party of the first part is indebted to the said parties of the second part, in the sum of one hundred and three thousand dollars on
32 account, being mostly for moneys loaned and advanced, and moneys paid, laid out and expended by the said parties of the second part for the said party of the first part, at its instance and request, and in and about the construction of the line of said road of said party of the first part:

And whereas the said parties of the second part have indorsed certain promissory notes, drafts and acceptances made by said party of the first part, and are liable as sureties on promissory notes, drafts, acceptances and contracts, in which said party of the first part is the principal debtor, to a large amount, to wit, in about the sum of eighty-four thousand dollars in all:

And whereas it is contemplated and expected that such promissory notes, drafts, acceptances and contracts in which the said parties of the second part are sureties for said party of the first part, will be from time to time extended or renewed, and that the said parties of the second part will be sureties on the notes or contracts given in renewal thereof:

Now, if the said party of the first part shall well and truly pay to the said parties of the second part, their heirs, executors, administrators or assigns, the said sum of one hundred and three thousand dollars, with interest thereon, and shall well and truly pay to the said parties of the second part, their executors, administrators or

assigns, such promissory note or notes, drafts, bills of exchange or acceptances as may be given by said party of the first part to the said parties of the second part, for or on account of the said sum of one hundred and three thousand dollars, or any part or portion thereof, and shall well and truly indemnify and save harmless the said parties of the second part of, from and against all suits, actions,
33 damages and liabilities, occasioned, caused, sustained or incurred as such sureties as aforesaid, or by reason of their being such sureties, and against all liability as surety or sureties on any note or notes, contract or contracts, hereafter given or to be given, in extension or renewal of any debt or debts, for which they are now liable as sureties, then these presents to be void; otherwise to remain in full force, effect and virtue.

And it is understood and agreed, that the sum of one hundred and three thousand dollars above mentioned as being due and owing from said party of the first part to the said parties of the second part, is the sum now actually due and owing, as near as it can be ascertained without a full and complete statement of accounts between the parties, and such sum is to be either increased or diminished, so as to correspond with the sum actually due, as it may be found and ascertained on final settlement.

And it is further agreed, by and between the parties hereto, that the said party of the first part shall, on the 23d day of June, A. D. 1858, deliver possession to said parties of the second part of the entire railroad track of said corporation, extending from the depot in the city of Milwaukee, to the southern line of the State of Wisconsin, together with its side tracks, depot grounds, depots, and all buildings, turnouts, tenements, cars, engines, rolling stock, fixtures and appurtenances of whatsoever nature and kind, and of all the property in and by this instrument mortgaged to said parties of the second part, to be by them held, used and operated as herein mentioned; subject, however, to all existing contracts and agreements with any other railroad company whose railroad connects with the road of said party of the first part.

And it is further agreed, by and between the parties hereto,
34 that the said parties of the second part, after receiving possession of said railroad and its appurtenances, and the other mortgaged property, shall continue in possession thereof until this mortgage is foreclosed, or the right of the said parties of the second part to such possession shall cease pursuant to the terms of this agreement, and that they during the time of such possession shall operate said railroad in such manner as will produce the largest amount of net receipts, and shall receive the tolls, income and profits thereof. That the said parties of the second part shall, during the time they are in possession of said road, keep the same and all the rolling stock therein in good repair, and shall receive and appropriate, in the manner hereafter mentioned, all the receipts and income to be derived from the operation of said road.

And it is further agreed, that the said parties of the second part may, if it shall be necessary, or if they deem best, purchase addi-

tional rolling stock for the use of said road, and appropriate moneys received from the operation of said road, to and for the payment thereof.

And the said parties of the second part hereby covenant and agree that they will defray all the current cost and expenses of keeping said railroad and rolling stock in good and thorough repair, and all the expenses of operating said road, including damages, if any, to persons and property, and that they will, during or by the last day of each and every month, make out and deliver to said party of the first part a correct statement, exhibiting the total receipts and income of said road from all sources during the next preceding month; also the costs and expenses during such month of rolling stock purchased, and of keeping said road and rolling stock in
35 repair; also exhibiting the net receipts from said railroad, after deducting such costs and expenses of rolling stock and repairs, and of operating said road; and that they will at any time, on demand of said corporation by its president or secretary, furnish a statement in detail of the items of which such monthly statements are composed.

And the said parties of the second part agree that the net receipts, after deducting the costs and expenses of repairs and of rolling stock purchased, and of operating said road, as exhibited by the monthly statements aforesaid, shall be appropriated by them in the manner following, to wit:

First. To the payment of all interest which shall hereafter become due upon four hundred thousand dollars of the bonds of the said party of the first part, secured by a first mortgage or deed of trust upon the stock and franchises of said corporation and all its property, real and personal; which mortgage or deed of trust bears date October 5th, 1853, and was made by said corporation, by the name of the Green Bay, Milwaukee and Chicago Railroad Company, to Francis A. Palmer, of the city of New York, trustee, &c.

Second. To the payment of all coupons hereafter to become due on two hundred thousand dollars of bonds issued by the city of Milwaukee to said party of the first part, and secured by a second mortgage or deed of trust on said railroad and its appurtenances, and which second mortgage bears date the day of .

Third. Whatever balance of said net proceds shall remain after the payment of the interest hereafter to become due on the debts secured by the said first and second mortgages or deeds of trust shall be applied by the said parties of the second part to the pay-
36 ment of the sum or sums of money due, or hereafter to become due, from said party of the first part, and which are secured by this mortgage, or to the payment of any debt or debts for which said parties of the second part are liable as sureties of the said party of the first part, or may hereafter become liable by reason of endorsing or signing any note or contract given in extension or renewal of any indebtedness of said party of the first part for which the said parties of the second part are now liable; and it is to be discretionary with said parties of the second part whether to apply

such balance of said net receipts on the indebtedness of said company to them or the promissory notes or drafts given for the whole or any part of such indebtedness, or on debts owing by said company for which they are surety, or part upon one and part upon the other. And the said parties of the second part further agree that whenever the sum or sums of money, debt or debts, mentioned in the condition of this mortgage, shall be fully paid and satisfied, and the said party of the first part shall in all respects have indemnified and save harmless the said parties of the second part from and against any and all liabilities as sureties aforesaid, and shall have in all respects performed and fulfilled the conditions of this mortgage, that then they will deliver possession to the said party of the first part of said railroad and its appurtenances, and of all the property herein and hereby mortgaged, and of such property as may be by them purchased and paid for out of the receipts or income of said road, except such as may be worn out, destroyed, or consumed in the operation of said railroad. It is further agreed that nothing herein contained shall be construed to prevent the parties of the second part from foreclosing this mortgage at any time.

And it is further agreed that said parties of the second part may, if they shall deem it best, pay out of the receipts of said road any sums of money necessary to acquire or perfect the right of way to any part of the tract or depot grounds of said road, also any
37 damages for which said corporation is liable for injuries heretofore done to persons or property, and also any sums of money owing by said corporation for expenses of operating said road. And it is agreed that the moneys now under the control of said corporation, being some seven or eight thousand dollars, shall be applied to the payment of the current operating expenses of said corporation, balances, if any, due to connecting railroads, and any interest which may become due on the first day of July next on the debt or debts secured by said first and second mortgages.

In witness whereof, the said party of the first part has caused these presents to be signed by its president and attested by its secretary, and caused its corporate seal to be hereunto [SEAL.] affixed, and the same are signed by the said parties of the second part, the day and year first above written.

C. B. HALL,
Pres't Milwaukee & Chicago R. R. Co.

Attest:

A. V. H. CARPENTER,
Secretary.

In the presence of D. G. ROGERS,
CHAS. J. DOUGHTY.

BISHOP & Co.

STATE OF WISCONSIN,
County of Milwaukee, ss:

On this 22d day of June, A. D. 1858, before me personally came C. B. Hall, pres't of s'd co., to me personally known, who being by

me duly sworn, did depose and say that he is the president of the Milwaukee and Chicago Railroad Company; that the seal affixed to the foregoing instrument is the corporate seal of the said Milwaukee and Chicago Railroad Company, and was affixed by him thereto by the authority of the board of directors of said company, and
38 that he signed his name thereto as president by like authority.

And thereupon the said C. B. Hall acknowledged to me that he executed the foregoing instrument as president of the Milwaukee and Chicago Railroad Company, and as and for their act and deed, for the uses and purposes therein mentioned.

D. G. ROGERS,

[SEAL.] *Notary Public, residing in Milwaukee county, Wis.*

STATE OF WISCONSIN,
Milwaukee County, ss:

On this the 22d day of June, A. D. 1858, before me came Ethan F. Bishop, to me known to be the individual mentioned and described in the instrument above subscribed by him, and ackowledged that he executed the same in his own behalf, and in behalf of the firm of Bishop & Co., of which firm he is a member.

D. G. ROGERS,

[SEAL.] *Notary Public, residing in Milwaukee county, Wisconsin.*

Received for record June 24th, 1858, at 10¼ o'clock a. m., and recorded in vol. 43 of mort'gs, on pages 456, 457, 458, 459, and 460.

A. BALLE, *Register, Milwaukee County, Wis.*,
By SAMUEL WAIGLE, *Deputy.*

Received for record June 28, A. D. 1858, at 10¼ o'clock a. m., and recorded in vol. Z of mortgages, pages 47. 48, 49, & 50.

WM. M. SHEPHARD, *R'g'st. of Deeds, Racine Co., Wis.*

Received for record June 29th, 1858, at 9¼ o'clock p. m., and recorded in vol. G of mortgages, on pages 415, 416, 417, & 418.

G. GILLETT, *Register, Kenosha Co., Wis.*

39 *Deposition of A. V. H. Carpenter.*

And the following deposition, on the part of the complainant, was filed in said cause on the 5th day of December, 1861, as follows:

District court of the United States of America for the district of Wisconsin.

E. FERRIS BISHOP and JOHN W. STEWART, trustees; Iron Bank, Farmers' Bank, Pequonnoc Bank, The Patterson Iron Company, S. S. Robbins, William D. Bishop, W. J. Canfield, administrator of the estate of Lee Canfield, deceased, Charles Palmer, Frederick Schuchardt, Frederick C. Gebhard, Frederick Gebhard Schuchardt, Francis Vose, Charles L. Perkins, John B. Kettell, Morris K. Jesup, Salem H. Wales, J. W. Lewis, W. Jamieson, American Exchange Bank, and Corn Exchange Bank,
vs.
MILWAUKEE and CHICAGO RAILROAD COMPANY. } In equity.

The deposition of A. V. H. Carpenter, a witness on behalf of the complainants, taken before Edward Kurtz, a commissioner of said court, at his office, in the city of Milwaukee, on the 5th day of December, 1861.

Present: Wallace Pratt, counsel for complainants.

And the said A. V. H. Carpenter, being duly sworn, says:

I am secretary of the Milwaukee and Chicago Railroad Company, and as such have charge of the books, papers, and records of the company. Have been such secretary since June 22d, 1858.

I am familiar with the mortgage given by the said Milwau-
40 kee and Chicago R. R. Company to E. Ferris Bishop and John W. Stewart, as trustees, dated June 22d, 1858, and the one described in the bill of complaint in this cause. From the books and records of the company, I know the debt which the mortgage was given to secure. The mortgage was intended to cover all the unfunded debt of the company. At the time of the execution of the mortgage the unfunded debt was, for the most part, evidenced by acceptances by the assistant treasurer of the company in New York city, of the drafts of the company, to the order of the secretary of the company, and by the secretary indorsed. The acceptances were due in from three to six months from their date. The drafts have been renewed from time to time, and interest paid at the time of such renewal except as to one draft. I know that there are judgments in this court in favor of the complainants, respectively, except as to the complainants, E. Ferris Bishop and John W. Stewart, J. W. Lewis, and W. Jamieson. I know upon what these judgments were founded. They were founded upon the renewed drafts hereinbefore spoken of, and were, in fact, a portion of the same debts secured by

the mortgage of June 22d, 1858. The amounts for which judgments were rendered were due at that time to the several plaintiffs in those judgments respectively. The judgment in favor of the complainant, Charles L. Frost, is for the amount due to him, and is also a part of the debt secured by the mortgage. In addition to the aforesaid judgments, there are two other claims which were secured by the mortgage, one of which is due and owing to the complainant, J. W. Lewis, on an acceptance similar to those described above, dated Feb. 6th, 1857, for $5,000. This draft was drawn at nine months, with interest after maturity, and has never been renewed, and there is now due on it the sum of $6,366 94. The other is due and
41 owing to the complainant, W. Jamieson, on a similar acceptance, dated Oct. 20, 1859, for $626 65, drawn at four months, with interest from date, and has not been renewed, and there is now due on it the sum of $719 86. These, I believe, to be all the debts secured by the mortgage so far as the books, papers, and records of the company show at the present time.

I executed this mortgage as the secretary of the company. Since the trustees have been in possession of the road, I have acted as cashier and bookkeeper a portion of the time, and have now charge of the books and papers, showing the account of their receipts and disbursements as mortgagees in possession since they took said possession. I have had actual knowledge of the amount of said receipts and disbursements, and the way in which such disbursements have been made ever since the mortgagees took possession.

Payments have been made on the interest of prior mortgages, according to the provisions of this mortgage with the net earnings of the road, and also the interest upon most of the unfunded debt up to the time of the giving of the acceptances upon which said judgments were founded, has been paid out of such net earnings.

The amount of interest now past due and unpaid on the first mortgage, as appears by the books of the company, is $592 00. The amount of the interest now past due and unpaid on the second mortgage, as appears by the books, is $2,362 50. Both of these amounts the mortgagees are ready to pay whenever the coupons are presented.

The next instalment of interest on the second or city mortgage, amounting to $3,500, falls due on the 1st of January next. And the next instalment of interest on it after that falls due on the
42 1st day of March next, amounting to $3,500.

On or before the tenth day of January, 1862, the State license has to be paid, amounting to about $1,500. After paying the interest past due on the first and second mortgages, and the expenses of operating the road, other necessary disbursements, there will probably be no cash assets on hand to apply to the payment of any portion of this mortgage. The reasons why I cannot, at this time, render an exact account of the receipts and disbursements of the mortgages, or why it cannot be rendered, are, that the company has unsettled accounts with foreign railroad companies and other transportation lines, to the number of 50 or 60, which it is impossi-

ble for us to adjust until reports have been received from those companies, which cannot be done under, perhaps, two months' time.

To all appearance the road economically and as now managed will nett sufficient over and above expenses to pay the interest and State tax, which will fall due between this time and the time when a sale of the road can be had, provided such sale shall be had before the 1st of April next. The probable expenses of effecting a change in the management of the road, at the present time, would be from $1,000 to $2,000.

A. V. H. CARPENTER.

DISTRICT OF WISCONSIN, *ss:*

I certify that the foregoing deposition was taken at the time, place, and in the presence of counsel, as stated in the caption thereof. That the said witness was first by me duly sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, and that his deposition so taken on oath was re-
43 duced to writing by me, and then carefully read over to him, and by him subscribed in my presence.

Dated Milwaukee, Dec. 5th, 1861.

EDWARD KURTZ,
U. S. Commissioner, District of Wisconsin.

Decree.

And same day (Dec. 5th, 1861) these proceedings were had, to wit:

E. FERRIS BISHOP, JOHN W. STEWART, trustee, IRON BANK, Farmers' Bank, Pequonnoc Bank, The Patterson Iron Company, S. S. Robbins, William D. Bishop, W. J. Canfield, administrator of the estate of Lee Canfield, deceased, Charles Palmer, Frederick Schuchardt, Frederick C. Gebhard, Frederick Gebhard Schuchardt, Francis Vose, Charles L. Perkins, John B. Kettell, Morris K. Jesup, Salem H. Wales, J. W. Lewis, W. Jamieson, American Exchange Bank, Corn Exchange Bank, and Charles L. Frost,
vs.
MILWAUKEE AND CHICAGO RAILROAD COMPANY.
} In equity.

This day this cause came on to be heard at this time upon the bill taken as confessed by the defendant, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed by the court as follows, to wit: That the report of Edward Kurtz, a master of this court, wherein there appears to be due to the complainants, Frederick Schuchardt, Frederick C. Gebhard,
44 and Frederick Gebhard Schuchardt, the sum of thirty-five thousand four hundred and sixteen dollars and eighty-three cents; to the complainant, Farmers' Bank, the sum of twenty-nine thousand three hundred and ten dollars and twenty-three cents; to American

Exchange Bank, the sum of thirty-three thousand and three dollars and forty-five cents; to Salem H. Wales, the sum of thirty-seven thousand four hundred and forty dollars and ninety-six cents; to Morris K. Jesup, the sum of forty-three thousand five hundred and two dollars and ninety-two cents; to Iron Bank, the sum of seventeen thousand three hundred and thirty-four dollars and eighty-three cents; to William D. Bishop, the sum of eleven thousand nine hundred and forty-six dollars and fifty-three cents; to S. S. Robbins, the sum of five thousand and thirty-five dollars and five cents; to Pequonnoc Bank, the sum of five thousand nine hundred and seventy-two dollars and fifty-seven cents; to Corn Exchange Bank, the sum of three thousand four hundred and thirty-one dollars and thirty-three cents; to Charles Palmer, the sum of two thousand two hundred and thirty-five dollars and forty-seven cents; to Morris K. Jesup, the sum of one thousand one hundred and thirty-seven dollars and ninety-three cents; to the Patterson Iron Company, the sum of two thousand seven hundred and thirty-one dollars and thirty-six cents; to W. J. Canfield, administrator, &c., the sum of five thousand and thirty-five dollars and five cents; to Francis Vose, Charles L. Perkins, and John B. Kettell, the sum of two thousand two hundred and fifty-eight dollars and seven cents; to Charles L. Frost, eleven thousand two hundred and ninety-five dollars and sixty-two cents; to J. W. Lewis, six thousand three hundred and sixty-six dollars and ninety-four cents; and to
45 W. Jamieson, seven hundred and nineteen dollars and eighty-six cents, making the total amount of two hundred and fifty-four thousand one hundred and seventy-five dollars, to be due to the several complainants at the date of said report on the judgments, acceptances, and mortgage in said bill mentioned for principal and interest, be, and is hereby, confirmed.

It is, therefore, on motion of Carey and Pratt, of counsel for said complainants, further ordered, adjudged and decreed, and this court doth hereby order, adjudge and decree that all and singular the mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, be sold at public auction under the direction of the marshal for this district, unless said mortgagor previous to such sale shall pay to said complainants the said sum of two hundred and fifty-four thousand one hundred and seventy-five dollars, and interest thereon from this date, together with the costs in this cause to be taxed.

And it is further ordered that the said sale be made at the post office in the city of Milwaukee, within this district, and that said marshal give public notice of the time and place of such sale by advertisement published in some newspaper printed in said city, and also in some newspaper printed in the city of New York, at least once in each week for three months previous to the day of sale; and that said complainants, or any of the parties to this cause, may become the purchaser thereof; and that said marshal execute a deed or deeds to the said purchaser or purchasers of the mortgaged premises, and that said marshal pay to said complainants or their solicitors, out of the proceeds of such sale, their costs in this cause to be taxed, and

46 also the aforesaid sum of two hundred and fifty-four thousand one hundred and seventy-five dollars, and interest thereon from this date to the day of such sale, or so much thereof as the purchase-money of the mortgage premises will pay, and that said marshal take a receipt for the amount so paid, and file the same with his report of sale, and that he brings the surplus moneys, if any there be, into court without delay, to abide the further order of the court.

And it is further ordered, adjudged, and decreed that the defendant, and all persons claiming or to claim from or under it, be forever barred and foreclosed of and from all equity of redemption and claim of, in and to said mortgaged premises, and every part and parcel thereof.

And it is further ordered and decreed that the purchaser or purchasers of said mortgaged premises at such sale be let into the possession thereof; and that any of the parties to this cause who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this cause, has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers, on production of the deed of said marshal for such premises, and a certified copy of the order confirming the report of sale in this cause.

And it is further ordered, adjudged, and decreed that any person or persons who may purchase the mortgaged premises at said sale shall comply with his or their bid within two days after the day of such sale, and on failure so to do, the purchase shall be forfeited, and the said marshal shall forthwith offer said mortgaged premises again for sale.

And it is further ordered, adjudged, and decreed that if the said complainants, or any one in their behalf, shall become the pur-
47 chaser or purchasers of said mortgaged premises at such sale, the marshal may take the receipt of the complainants or their solicitors for the amount for which the same are struck off to such purchaser or purchasers, or for any part thereof, (provided that the amount of such receipt does not exceed the amount herein adjudged to be due to the complainants, with interest and costs,) and may file such receipt with his report of sale; and the clerk of this court shall thereupon be directed and required to make a pro rata indorsement of the amount of such receipt upon the judgments and acceptances respectively mentioned and described in the report of the master herein.

The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, is as follows:

All the franchises and property of said corporation, (Milwaukee and Chicago Railroad Company,) real and personal, in the State of Wisconsin, including its railroad, extending from the State line through the cities of Kenosha and Racine to its terminus, in the city of Milwaukee, together with all the rights of way of said railroad, and all structures and buildings thereon, now erected or hereafter to be constructed, including all depot grounds and depot buildings, turnouts,

and privileges, all wood along the line of said railroad, all engines, cars, and all other property and rights of property now belonging to said company, or hereafter to be acquired, except money on hand and debts due to said company.

A. G. MILLER.

Decree signed, recorded, and enrolled December 5th, A. D. 1861.

J. M. MILLER, *Clerk.*

48 JUNE 2, 1862.

This day came Charles H. Wheeler, by his counsel, Messrs. Carpenter & Finch, and presented his petition in writing for leave to file a bill of review, and for other relief herein, as follows:

Petition of C. H. Wheeler.

In the district court of the United States for the district of Wisconsin.

E. FERRIS BISHOP AND OTHERS
vs.
THE MILWAUKEE AND CHICAGO RAILROAD COMPANY. } In equity.

To the judge of the district court of the United States for the district of Wisconsin, in equity:

Charles H. Wheeler, a citizen of the district of Wisconsin, your petitioner, humbly complaining, respectfully shows to the court here that the Green Bay, Milwaukee and Chicago Railroad Company was duly incorporated and organized under the laws of the State of Wisconsin, with capital stock amounting to one million dollars, about March, 1851; that afterwards, about March, 1857, its corporate name was changed to the Milwaukee and Chicago Railroad Company, and that said corporation, now made defendant in this suit, is the same corporation originally organized under the name of the Green Bay, Milwaukee and Chicago Railroad Company.

Your petitioner further shows that he is a stockholder of said Milwaukee and Chicago Railroad Company, and was the owner of 20 shares of its capital stock, amounting to two thousand dollars,
49 while the said corporation was known by its former corporate name, and before the making of the pretended mortgage mentioned in the bill of complaint in this cause, and which is sought to be foreclosed therein, which he ever since has and now does own and hold, and that as such stockholder he has been, and is, interested in its prosperity and affairs; that he is not named as a party to said suit, but is as a stockholder as aforesaid, interested in the subject-matter of said suit; that the whole property and franchises of said company are now fairly worth fifteen hundred thousand dollars; that the incumbrances thereon are:

First. A mortgage, called a first mortgage, to secure the payment of four hundred thousand dollars, ($400,000,) and interest at 8 per cent.

Second. A mortgage, commonly called the city mortgage, given to the city of Milwaukee, or its treasurer, to indemnify the said city against the payment of city bonds to the amount of two hundred thousand dollars, ($200,000,) issued by said city to aid said company in constructing its said railroad.

Your petitioner further shows that the said two mortgages, as he is informed and believes, and therefore shows, constitute the only valid and legal lines and incumbrances now on the property and franchises of said company; and that the said property and franchises of said company, if they can be protected against and vindicated from the fraudulent attempts of the complainants in this suit hereinafter set forth, are worth to the stockholders of said company at least nine hundred thousand dollars.

Your petitioner further shows to your honor that the rail-
50 road of said company was built, and furnished by a firm known by the name of Bishop & Co., under a contract made by and between said company and said firm on the 27th day of August, 1853, a copy of which is hereto attached, and marked Exhibit No. 1, which original contract your petitioner will produce, as this court shall direct; that said firm at that time was composed of E. Ferris Bishop, John W. Stewart, Levi Blossom, and William D. Bishop, and that soon after the date of said contract said firm commenced the construction of said road under said contract, and from time to time thereafter, as said worked progressed, the said company issued to said firm certificates of stock for various amounts, some portion of which said firm sold and transferred from time to time to raise money to carry on said work; that during the year 1854 the said firm had received from said company the said four hundred thousand dollars first mortgage bonds, one hundred on one hundred and fifty thousand dollars of the city bonds of said city of Milwaukee, which said firm accepted as so much money under said contract, and a large amount (but your petitioner cannot state precisely what amount) of certificates of capital stock; that said Blossom, in the month of February, 1854, went to Mobile, in Alabama, and was absent till about June 1, 1854; that during his said absence William D. Bishop, one of said firm, sold his interest therein to Robert Schuyler and George L. Schuyler, (firm R. and G. L. Schuyler,) of the city of New York, and said William D. Bishop retired, or pretended to retire, from said firm, and said Robert and George L. Schuyler took, or pretended to take, his place in said firm;
51 that on the return of said Blossom from Alabama to the city of New York, about June 1, 1854, the said E. Ferris Bishop represented to said Blossom that said firm then had on deposit in bank in New York about 43,000 dollars, and had on hand nearly all of said stock and bonds, which could be disposed of for a large sum of money, and that the affairs of said firm were in prosperous condition; that up to this time the said Blossom had known very little of the business condition of said firm, its financial affairs having been managed by said E. F. Bishop, J. W. Stewart, and one A. B. Brittin, who was a bookkeeper and clerk for said Bishop & Co.

That said Blossom soon thereafter returned to the city of Mil-

waukee, and about the 2d day of July, 1854, received a telegraphic message from said E. F. Bishop, informing him that Robert Schuyler had absconded, and requesting him, said Blossom, to repair immediately to New York; and that said Blossom thereafter immediately went to New York, and had several interviews with said E. F. Bishop, who, after great parleying and evasion, finally informed said Blossom that the firm of Bishop & Co. had lost, by the failure and absconding of said Robert Schuyler, about one hundred and eight thousand dollars, and that the said Bishop thought it best for the firm of Bishop & Co. to make an assignment; that the said Blossom refused so to do, and advised said Bishop that if the firm of Bishop & Co. had not lost more than said last-named sum, there was no need of their failing; that with the money of said firm then in bank, and the amount of securities then in the hands of said firm, the firm could easily extricate itself from said embarrassment and preserve its credit, and that he, said Blossom, preferred to stand up
52 under his share of said loss than to have said firm fail; that thereupon the said Bishop informed the said Blossom that said firm of Bishop & Co. were hopelessly insolvent; that he, said Bishop, had no property or earthly possession except some stock in the Naugatuck Railroad Company, which was then pledged to its full value; that said Stewart had little, if any, property except his homestead in Connecticut, which had then been attached; that said firm of Bishop & Co. had no money in the bank, but was indebted to the amount of about 360 or 370,000 dollars on obligations then outstanding, to secure which most of the securities owned by said firm were pledged.

Your petitioner shows, on information and belief, that the said E. F. Bishop and the said Stewart were then absolutely insolvent and utterly and hopelessly bankrupt, and that the firm of R. & G. L. Schuyler was also hopelessly bankrupt, and the said Robert Schuyler had absconded.

Your petitioner further shows that at various times previous to the 1st day of July, 1854, divers persons, not members of said firm, had become stockholders of said company; but that said Bishop & Co. then owned or controlled a majority of the whole stock of said company, and thereby had the power to elect a board of directors of said company such as they might choose; that the said E. F. Bishop and the said Stewart then and there confederated and combined together to cheat and defraud the said Blossom out of all his rights and interests in said firm, and to cheat and defraud all the other stockholders of said company.

That thereafter, and about October, 1854, the said Blossom, having abandoned all hope of extricating himself from the difficulties
53 in which the said Bishop and said Stewart had fraudulently involved him, left for California, leaving said E. F. Bishop and said Stewart in possession of the assets of said firm, and in possession of the line of road which said firm had theretofore been constructing under said contract; that said Robert Schuyler had before then absconded from the United States, and the said G. L. Schuyler,

as this petitioner is informed and believes, thereafter wholly abandoned said firm; and that thereafter the said E. F. Bishop and the said Stewart, both of whom were utterly bankrupt, exercised the right of controlling the affairs of said firm, including the right of controlling the organization and proceedings of said company, by virtue of the said stock belonging to or controlled by said firm. And on information and belief, your petitioner says that the said E. F. Bishop and the said Stewart, in prosecution of their said fraudulent purposes, and controlling the action of the said company in all things, fraudulently, and the better to execute their meditated fraud upon the other stockholders of said company, procured the company to declare the said contract forfeited; and immediately thereafter the said Bishop and said Stewart pretended to form a new firm, called also by the firm-name of Bishop & Co., but of which only the said Bishop and Stewart were partners; and said new firm, Bishop & Co., made, or pretended to make, some new contract or agreement, substantially like said former contract; and that said E. F. Bishop and said Stewart thereafter, with funds raised upon or resulting from the assets of said old firm of Bishop & Co., completed and furnished said railroad, so that the same was ready for
54 operation some time in the spring or summer of 1855; and that on or about that time the said company had fully paid to said Bishop & Co. the said sum of eight hundred and eighty thousand dollars, specified and stipulated to be paid by said contract for building and furnishing said road; and the said Bishop & Co. had then received from said company a large amount of its capital stock, viz: about seven hundred and forty thousand dollars of said stock over and above what, by said contract, said company were bound to pay to said Bishop & Co.; and said Bishop & Co. have received as cash all said city bonds, two hundred thousand dollars, and all said first mortgage bonds, four hundred thousand dollars in all; and that at or about that time said company was not at all indebted to said Bishop & Co., but that, on the contrary thereof, the said Bishop & Co. were justly and equitably indebted to said company in a large sum of money, viz: more than one hundred thousand dollars, and that so it would now be made fully to appear if a just and true accounting were to be had between said company and said Bishop & Co. of the avails then realized by said Bishop & Co. from the stock and securities of said company so by said Bishop & Co. before then received and disposed of for their own use.

And your petitioner further shows, on information and belief, that ever since the old firm of Bishop & Co. commenced work under said contract, as hereinbefore stated, said E. F. Bishop and said Stewart have had actual control of the organization and business affairs of said company, and ever since the completion of said road said E. F. Bishop and said Stewart have had control of the operation of said road, and have received and controlled its revenues, either as controlling the said corporation by virtue of the ownership of
55 a majority of its stock, or as pretended mortgages in possession, except a very short time when said road was in the hands

of a receiver of this court, in a certain suit brought in this court to foreclose a certain fraudulent mortgage, as hereinafter stated, and have received to their own use from the revenues of said road, and which equitably belong to the said company, an average of more than one hundred and fifty thousand dollars per year since the summer of 1855, or about one million of dollars in all over and above the operating expenses of said road, and about seven hundred thousand dollars over and above all the interest on actual indebtedness of said company; and that notwithstanding said Bishop and said Stewart were utterly, hopelessly insolvent when said road was completed, and really completed and furnished said road only out of the avails of stock and other securities paid or delivered by said company to said Bishop & Co., and although they have received from the earnings of said road about seven hundred thousand dollars, as hereinbefore stated, yet the said E. F. Bishop and said Stewart now fraudulently pretend that they have advanced large sums of money for and on account of the said company, and that said company has been getting steadily more and more into debt to said Bishop & Co. each year; and that said Bishop & Co. now hold indebtedness against said company to a large amount, either in their own name or in the names of their confederates and friends.

Your petitioner says that in pursuance of the said fraudulent design of said Bishop and said Stewart, and for the purpose of defrauding said company, they have, from the completion of said road to the present time, caused all its officers, directors, and agents to be men devoted to their individual interests and ready to do their bidding, to vote any resolution, or take any action in the name of said company which said Bishop & Co. might desire, without regard to
56 the interests of said company. That in the years 1854 and 1855, your petitioner was a director of said company; that at meetings of the board of directors held during those years, the said Bishop & Co., through their friends, frequently presented, to be passed by said board, long resolutions, which they insisted should be passed by said board without examination or discussion; that your petitioner, as director as aforesaid, protested against such course, and that, as your petitioner believes, on account of said objections which your petitioner made to voting blindly whatever resolutions said Bishop & Co. desired, your petitioner was by said Bishop & Co. turned out of said board in the election of directors held in February, 1856, and that your petitioner has not since had any particular knowledge of the affairs of said company; that within the last year he has several times applied to the pretended secretary of said company to examine the books and records of said company for the purpose of ascertaining what disposition had been made of the revenues of said road, whether there had been any necessity for executing the mortgage sought to be foreclosed in this suit; and if so, whether the same had not been paid; and he has been refused access to said books; and that he was informed by A. V. H. Carpenter, the pretended secretary of said company, defendant in this suit, that he refused to let your petitioner see said books by direction of Cary & Pratt, the solicitors for the complainants

in this suit; thus clearly showing fraudulent collusion between the said complainants and the said pretended officers of said company to insure a foreclosure of the mortgage in suit.

Your petitioner further shows, on information and belief, that all the present pretended officers of said company own only nominal
57 amounts of said company's stock, and are really the agents and friends of said Bishop & Co., and know no principal but said Bishop & Co.; and in all things act for the interest of said Bishop & Co., and not for the interest of said company, and that they are paid for their services by said Bishop & Co.

Your petitioner further shows that on or about the 28th day of November, A. D. 1857, the said E. F. Bishop and said Stewart, then actually controlling the proceedings of said corporation, and controlling the officers of said corporation, caused said corporation to pretend to make and perfect a certain mortgage on said road and the franchises of said company to one Scofield, a relation of said Bishop, to secure the payment of bonds to the amount of four hundred thousand dollars; that afterwards, said Bishop and said Stewart from time to time issued said bonds pretended to be secured by said mortgage to the amount of about three hundred and eighty-two thousand dollars; they, the said Bishop and the said Stewart, pretending falsely that it was necessary to issue said bonds to meet the indebtedness against said company, but really knowing that there was no such indebtedness, and really intending by means of said mortgage, and by foreclosure and sale under it, to extinguish the rights and interests of the other stockholders in said company.

That said Bishop & Co., controlling said company and its officers as aforesaid, caused said 382,000 dollars of said bonds to be placed in the hands of one Nickols, to be sold in name for the company; that the said mortgage and the bonds therein named were originally issued fraudulently and without any good or valuable consideration, and for the purpose of affording a pretext for foreclosing the same and cutting off all the capital stock of the company; that the whole
58 issue of the bonds contemplated in that mortgage was $400,000 dollars; that of that amount only 388,000 dollars were ever executed, and only 382,000 dollars are now even nominally out; that that mortgage was made by the company and delivered, and those bonds therein mentioned were issued, by authority of a resolution of the board of directors of the company passed about November 25th, 1857, expressly, as was pretended, "for the purpose of funding the then existing floating debt of the company;" that the bonds so issued were *not* sold and disposed of, and the avails, in money, used to pay the debts of the company, (the bonds passing beyond the control of the company and into the hands of persons unknown to the petitioner,) but were retained in the control of the company, in the hands of their treasurer, and as late as the month of February, 1858, were by resolution of the board of directors made collateral security to the floating debt of said company pretended to be held or endorsed by said Bishop & Co., and were placed in their hands to be used by them in the payment of said pretended floating debt held and endorsed by

them, but said Bishop and Co. did not use such bonds to pay said floating debt, but continued to hold the same.

And on the 22d day of June, A. D. 1858, the company by its board of directors resolved that Bishop & Co. place the said 400,000 dollars of bonds in the custody of Horace Nichols, esq., of Bridgeport, Connecticut, which was done, with instructions to said Nichols (who was but the tool and employé of said Bishop & Co. in that behalf) "that after 60 days' notice by said Bishop & Co. to the secretary of the company, he, said Nichols, should proceed (if thereto requested by said Bishop & Co.) to realize by selling a sufficient number of said bonds to pay the amount of indebtedness past due, of which such 60 days' notice should have been given."

59 And your petitioner, upon information and belief, expressly states, and charges the fact to be, that said Nichols was the mere agent and tool of said Bishop & Co. in respect to said transactions; that he never had or received any instructions from said company, except it be through said Bishop & Co.; that in all things he observed the wishes and directions of said Bishop & Co.; that afterwards, when said Bishop & Co. had conceived the fraudulent design to foreclose, or cause to be foreclosed, the said mortgage, in the winter or spring of 1859 and 1860, at the request and under the direction of said Bishop & Co., he, the said Nichols, made a pretended sale of all the entire issue of said 3d mortgage bonds, being in amount 382,000^{00} dollars on their face, for the trifling sum of about one per cent. of the par value thereof, or 3,782^{00} dollars in the whole, from which he deducted his commissions and charges, and pretended to apply 3,737 dollars, or thereabouts, on the floating debt of said company held by said Bishop & Co.; that such pretended sale by said Nichols was made to, and the bonds delivered to, one A. B. Brittin; that said Brittin is a man of no pecuniary resources, or of only very trifling means, and even with no means of support except his earnings; that he has no profession or calling except that of a book-keeper, in which capacity he has been for years, and until within a short time previous to such purchase, in the employ of said Bishop & Co.; and your petitioner charges the fact to be that he, the said Brittin, purchased said bonds not in any part on his own account, but as the agent and at the request of said Bishop & Co., and solely with their means and for their benefit; that no consideration whatever was in fact paid by said Brittin for the bonds so pretended to be purchased by him, nor was any consideration paid therefor by any one, except it be by the crediting of said company with 3,737 dollars, as aforesaid, in their account with said Bishop & Co.; that, in fact, the pretended sale by Nichols and

60 purchase by Brittin was a sham, conducted by and under the direction of said Bishop & Co., to enable them to carry out a scheme which they had theretofore formed of foreclosing and selling said road and property and becoming the sole purchasers and owners thereof.

Afterwards, to wit, on the 3d day of April, 1860, the said Bishop and said Stewart, having sold some of said bonds and received the

money thereon themselves, and having put other of said bonds in the hands of their friends and confederates, intending to accomplish said fraudulent purpose by foreclosure sale, as aforesaid, caused said Scofield to commence a suit on the equity side of this honorable court to foreclose said fraudulent mortgage, and caused service to be made on some pretended officer of said company, and caused said company to make no appearance in or defence to said suit, and procured from this honorable court in said suit, on the 7th day of June, A. D. 1860, the appointment of one C. B. Hall, a friend of said Bishop, and formerly, and since about 1853, in his employ at Bridgeport, in Connecticut, or in the employ of a railroad company, controlled by said Bishop, as station master, or in some other humble capacity, and upon regular salary, and who was in the employ of said Bishop or said company at the time of his said appointment, and that said Hall thereafter went through the form of giving a bond and taking possession as receiver, although, in fact, he was, as receiver, the mere tool of said Bishop & Co., as he had been while pretending to act as president of said company before his appointment as receiver, as aforesaid, and that on the 5th day of June, 1860, this honorable court made an order taking the bill of complaint as confessed against said company for want of answer to said bill. That on the 6th day of June, 1860, one Orlando Hunter applied to this court for
61 leave to answer the said bill, and the said Bishop & Co., or their solicitor, well knowing that said mortgage attempted to be foreclosed in that suit could not stand fire, and that any appearance by either of the defendants to said suit would probably expose the fraudulent designs and schemes of said Bishop and said Stewart in the premises, the said Bishop & Co. caused their solicitor, on the 7th day of June, 1860, to enter a discontinuance as to said Orlando Hunter, and on that day the bill was dismissed as to said Hunter. That afterwards, on the same day, a final decree was rendered by this court in said foreclosure suit for the amount of four hundred and thirty-seven thousand seven hundred and seventy-two dollars, and the said fraudulent schemes and designs of the said Bishop & Co. seemed on the eve of accomplishment; but afterwards the said Bishop & Co. became aware that Bedford B. Hopkins and Edwin Townsend, two stockholders of said company, were preparing or had prepared a petition to this honorable court to vacate said decree and admit them to defend said suit; and the said Bishop & Co. and their solicitor well knowing, if the facts and circumstances concerning the said mortgage and the manner in which it had been foreclosed by silence of said company were brought to the knowledge of said court, this court would set aside said decree and admit said Hopkins and Townsend to defend said suit, and knowing full well that said mortgage had not merits enough to meet any defence whatever, the said Bishop & Co., on the 15th day of October, 1860, directed and caused their solicitor, and the said company defendant, to make and file in said cause a stipulation as follows:

"It is stipulated that the decree of foreclosure and all orders
62 and decrees in this cause may be vacated and set aside, and an

order entered that the receiver deliver possession of the mortgage property to Bishop & Co., of whom he received possession; said cause to be retained only for the purpose of the receiver's accounting to the court for moneys in his hands and their disbursement according to the order of the court, and is then to be dismissed without prejudice."

Which said stipulation is signed—

"JASON DOWNER, *Sol. for Compl't.*
"MILWAUKEE & CHICAGO
RAILROAD COMPANY,
"By S. B. SCOTT, *President.*
"BISHOP & CO."

And an order was entered November 5, 1860, vacating said final decree according to stipulations, and the money on hand was ordered to be paid over to said Bishop & Co.; and the said Bishop & Co. thus withdrew from scrutiny and examination in this honorable court the said fraudulent mortgage, which had been detected, and determined to resort to some more ingenious and subtile device to accomplish their said fraudulent designs; and the said mortgage which had thus, by fraudulent collusion between said Bishop & Co. and said railroad company controlled by Bishop & Co., passed through all the forms of legal proceedings to a final decree for the large sum of over four hundred thousand dollars, has not been heard of since, and the said Bishop & Co. returned to the possession of said road and revenues as they had been before they thus attempted to foreclose themselves out.

And your petitioner submits to the court that the whole history of this remarkable proceeding in this court—remarkable for the amount involved, remarkable for the high character of the conspirators, remarkable for the audacity with which such an enormous fraud
63 was attempted, and not less remarkable for the cowardice with which it was abandoned as soon as the scheme was detected—ought to be regarded as strong evidence that the present mortgage, which the same parties are attempting to foreclose in this suit by like fraudulent collusion, is not more meritorious, and should incline this court to at least let it be inquired into before a sale is allowed to take place, which will extinguish the rights of all stockholders of said company.

Yet your petitioner further shows, that said mortgage thus withdrawn to prevent a defence has never been discharged of record, but still remains a cloud and incumbrance of record on the property and franchises of said company; and your petitioner says, that said Bishop & Co. have been pretending to apply the earnings of said road, for the last five years, in payment of said 382,000 dollars of bonds thus fraudulently purchased by said Bishop & Co., and that this is meant by the modest averment in the bill of complaint, as follows:

"And your orators further show, that on the 22d day of June, 1858, your orators, Bishop and Stewart, as trustees as aforesaid, took possession of said railroad and appurtenances, together with all the mortgaged property, as mortgagees as aforesaid, and since that time

have continued to hold the same as such mortgagees, (except a short time during the year 1860 while the same was in the hands of C. B. Hall as receiver, appointed by this court,) and that they are now in possession thereof as such mortgagees; that your orators, Bishop and Stewart, have applied and appropriated the earnings of said road and mortgaged property in pursuance of the terms and conditions of said mortgage, and that the whole amount of said earnings have been absorbed in payments made under said mortgage on claims prior to the demands of your orators, except a small amount which
64 has been applied in payment of interest, &c."

Your petitioner shows, that in pursuance of said fraudulent scheme and design, the said Bishop & Co. having full control of said company and its officers as aforesaid, in the year 1857, caused one Charles K. Watkins, who then was pretending to act as president of said company, but really acting in his said office as the agent and tool of said Bishop & Co., to sign a great number of drafts first mentioned in this bill of complaint in this case; that the same were generally signed by said Watkins in blank, and pretended to be drawn upon one Scofield, who pretended to be treasurer of said company, but who was really, and for years had been, clerk and servant in and about the business of said Bishop & Co. and said railroad company, in his, said Bishop's office, in the city of New York, and a relative of said Bishop; that said drafts thus signed in blank were sent to said Bishop in New York by said Watkins, and were by him filled up at pleasure with such sums and for such purposes as the said Bishop & Co. elected, and were then endorsed by said Bishop & Co. and passed, or pretended to be passed, to divers persons by said Bishop & Co. for their own benefit, and the said Bishop & Co. received and appropriated to their own use the avails thereof without the knowledge or superintendence of any officer of said company; and that said drafts on their maturity were taken up by said Bishop & Co. with money received by them from the revenues of said road, belonging to said company; and that the drafts thus taken up by said Bishop & Co. with the said company's money were afterwards presented by said Bishop & Co. to the board of directors of said company as pretended evidences of indebtedness from said company to said Bishop & Co.; and that by this false and fraudulent means the said Bishop & Co. have
65 manufactured and trumped up pretended indebtedness against said company which are the same, in part, set forth in the bill of complaint in this cause.

Your petitioner further says, that in pursuance of said fraudulent designs, the said Bishop & Co., controlling the said corporation and its officers, on the 22d day of June, 1858, caused the said Charles B. Hall, who has for the last eight or ten years been in the employ of the said Bishop & Co. in various capacities and different characters, and who was then serving them in the pretended capacity of president of said railroad company, to pretend to make and execute a mortgage, in and by which he, the said Hall, as president of said company, pretended to mortgage to said Bishop and Stewart, as trustees,

the said road and franchises of the said company in the terms and to the effect set forth in the bill of complaint in this cause.

But your petitioner says that said mortgage was not properly executed by or in the name of said company so as to be in law the deed of said company, but that, on the contrary thereof, the same is executed by said C. B. Hall, and attested by one A. V. H. Carpenter as secretary of said company, and that the said Hall acknowledged that he executed said mortgage, &c., but that the same does not purport to be signed by the said railroad company; and your petitioner is advised, and therefore shows, that said pretended mortgage has no effect in the law as the deed of said company on account of the manner in which it was executed and acknowledged as hereinbefore stated, and for want of due execution in the name of said company, but that the same is, in legal effect, the deed of said Hall, and not of said company.

But your petitioner further shows, that even if in the opinion of this court said mortgage is so executed as in form to be the
66 deed of said company, that the same is illegal, fraudulent, and void, for the reasons that the same was made and executed by and between the said company and said Bishop & Co. by fraud and collusion, with the fraudulent intention and purpose on the part of said Bishop & Co. and said Hall to thereby aid and assist the said Bishop & Co. in their fraudulent design to extinguish the rights of all other stockholders of said company, and for the reason that the greater part, if not all, the indebtedness mentioned in said bill of complaint, and therein averred to be by said mortgage secured, are false and fraudulent claims, and that the pretended owners and holders thereof, orators in said complaint mentioned, (except said Bishop & Co..) are fraudulently colluding with said Bishop & Co., aid said Bishop & Co. to extinguish the rights of the stockholders of said company by means of said mortgage and the foreclosure and sale under the same.

Your petitioner further shows, that all the said judgments at law recovered as in said bill of complaint mentioned were recovered by fraudulent combination and collusion between said company, by its officers, and said Bishop & Co., and by default of said company, which made no defence to any of said suits being controlled by said Bishop & Co. in that behalf.

Your petitioner further shows, that he is informed, and believes, that said judgment in favor of the administrator of Lee Canfield for nearly five thousand dollars, and the judgment in favor of the Iron Bank for over $17,000, mentioned in said bill of complaint, and included in the decree in this cause, have been fully paid and satisfied, and that the said Bishop & Co. are fraudulently pretending to keep said judgment on foot to aid their said fraudulent scheme, although they well know that the same have been paid.

67 Your petitioner further shows, that he is informed, and believes, that all the said pretended judgments at law mentioned in said bill of complaint have been fraudulently entered up by said Bishop & Co. against said company upon pretended indebtednesses

which have no real existence, and that so it could be made to appear, if a defence be allowed to this suit, that the bill of complaint in this suit is not bona fide. And your petitioner represents that all the said judgments were obtained on default, and that no man has yet, anywhere in all these proceedings, testified or made affidavit that any of the said pretended claims mentioned in said bill of complaint are just and true; and your petitioner represents that he believes that, if by the proper defence to this action, and by cross bill filed therein, the said complainants were compelled to answer on oath as to their said pretended claims, that no one of said complainants would dare to testify thereto, and that this suit would be abandoned, as the suit in this court on said former mortgage was abandoned after a final decree therein, as hereinbefore stated.

Your petitioner further represents that this suit was commenced in this court, and is now prosecuted, by fraudulent collusion between said Bishop & Co. and said company controlled by said Bishop & Co.; that the company made no appearance in or defence to the same, and that a decree has been entered in this suit by this court upon the bill of complaint taken as confessed.

Your petitioner further states that the compensation fixed by said contract, a copy of which is hereto attached, marked exhibit No. 1,
68 was amply sufficient to build said road, and furnish the same, as called for by said contract; that said road is but about forty miles long, running along the lake shore, through an unusually level country, and that from the Racine bridge to the State line the cost of construction of the superstructure, and cost of iron and putting the same down, did not exceed 10,000 dollars per mile, and that there are many miles of the said road the grading of which did not cost to exceed two thousand dollars per mile, and that the iron cost but about 6,000 dollars per mile, and that the whole cost of building said road from Milwaukee to Racine did not exceed 15,000 dollars per mile, making the whole cost of the said road about five hundred and twenty-five thousand dollars; that the four locomotives cost about 32,000 dollars; eight passenger cars cost about 16,000 dollars; 3 baggage cars cost about 3,000 dollars; 15 freight cars cost about 8,000 dollars; 24 gravel cars cost about 8,000 dollars; and that all the depot buildings and other necessary improvements to put said road in running order would not have cost and did not cost to exceed 10,000 dollars; making the entire cost of building and equipping said road, according to said contract, about six hundred and forty-two thousand dollars, and that the eight hundred and eighty thousand dollars fixed by said contract left a handsome margin for profits, discount on bonds, and all other contingencies.

Your petitioner further shows that there is an entry on the books of said company, which your petitioner believes was caused to be made by said Bishop & Co., crediting said company as follows:

'1855, Dec. 31.—By stock of this company	$1,000,000	00
First mortgage bonds	400,000	00
Avails of city bonds	101,600	28;"

69 from which it appears that said Bishop & Co. had received before the completion of said road more than was called for by said contract, and were indebted to the company, although said entry as to city bonds is fraudulently entered at 101,600 dollars 28 cents, whereas it ought to have been extended at 200,000 dollars, the sum at which said company actually received the same as cash.

Your petitioner further shows that said Bishop & Co. have, for the purpose of making up a claim against said company, pretended on the books of said company to credit said company the following items:

"April, 1855.—Cash to Mil. city bonds for avails of $50,000, sold Moran Bros. by L. Blossom, Oct., 1854	$7,711	85
"Bishop & Co., cash avails of bonds as above, as per sale by them	7,711	85
"August 19.—Cash to Mil. city bonds for avails of bonds converted by R. and G. L. Schuyler, $50,000	9,000	00
"Bishop & Co. to cash ac. for amt. avails of bonds, as above	9,000	00"

So that by this method the company gets for 50,000 dollars in Milwaukee city bonds, which said Bishop & Co. received as cash, a credit of only the sum of 7,711 dollars 85 cents; and for other 50,000 dollars of said bonds, alleged to have been converted by R. and G. L. Schuyler, but 9,000 dollars, although said bonds were received from said company by said Bishop & Co. at par, and if said bonds were converted by Schuyler, the said Schuyler & Blossom were
70 then members of the firm of Bishop & Co.; and your petitioner further shows, that if such losses were suffered, they were losses of said Bishop & Co., and not of said company; and that in the subsequent negotiations between said Bishop and Stewart with Blossom, the said Bishop and Stewart insisted that said Blossom should, and he did, contribute to said losses, and settle the same fully with them; so that the said Bishop & Co., by afterwards thus attempting to charge said losses upon said company, were acting fraudulently, as before shown, and the fraud thus committed is part of the claim sought to be enforced in this suit; that the whole or a large portion of said indebtednesses have been manufactured by the like dishonest and fraudulent collusion between said Bishop and Stewart, and their willing tools, the pretended officers of said company.

So your petitioner, recapitulating, shows to the court that the said Bishop & Co. agreed to build the said road, and furnish the same as per said contract, for the sum of 880,000 dollars.

That they have received—

Stock	$1,000,000
1 mortgage bonds	400,000
City bonds	200,000

3d mort. bonds	$382,000
And now claim by this mortgage	247,000
Over and above earnings of road not less than net	700,000
	2,929,000

Your petitioner further shows, that the marshal of this district has advertised said road and franchises for sale under the decree in this cause, and that the same was advertised to be sold on the sixth day of June, and adjourned to the 19th day of June, 1862, and
71 will be so sold, unless said sale be stayed by this court.

Your petitioner further shows, that he knew nothing of the entering said judgments at law in said bill mentioned nor of the commencement of this suit, until by mere accident he noticed or was informed that said road was advertised for sale; that he then learned that this suit was pending in this court, and that a final decree of foreclosure and sale had been rendered therein.

That your petitioner soon thereafter applied to S. B. Scott, pretended president of said company, for leave to examine the books and records of said company, for the purpose of ascertaining the facts necessary to corroborate and substantiate the defence of said company to said suit, and to show said mortgage being foreclosed therein to be fraudulent and void; but said Scott informed your petitioner that he had no control over said books and papers, and referred your petitioner to A. V. H. Carpenter, the pretended secretary of the company, that your petitioner repeatedly thereafter applied to said A. V. H. Carpenter for the like permission, and after repeated evasions and delays, was informed by said A. V. H. Carpenter that he had advised with Messrs. Cary and Pratt, the solicitors of complainants in this suit, and had been advised by them not to show your petitioner said books and papers of said company, and that he should therefore refuse so to do; and did then refuse so to do, although he was secretary of said company defendant; so that it appears that the solicitors of said complainants in this suit are controlling both the prosecution and defence of said suit.

Your petitioner, therefore, prays your honor to vacate and set aside the decree entered in this suit, and for leave to enter appearance and make defence to this suit, and for that purpose to use the
72 name of said company; and for leave to control said defence, although in the name of said company; and for leave to put in an answer to said bill of complaint, and to file a cross bill therein; and for leave to undertake and commence the defence of said suit, in all respects, as if the said defence had been interposed before the time to answer said bill had expired; and for leave to conduct and manage said defence in all the ways that the said company might have conducted and managed the same, if it had acted in good faith

in that behalf; and your petitioner prays for such other and further relief as shall be agreeable to equity and good conscience.

MAT. H. CARPENTER,
Solicitor for said Petitioner.
FINCHES, LYNDE & MILLER, and A. FINCH,
Of Counsel.

Exhibit No. 1.

This agreement, made this 22d day of August, A. D. 1853, by and between E. Ferris Bishop, William D. Bishop, and John W. Stewart, of the city of Bridgeport, State of Connecticut, and Levi Blossom, of the city of Milwaukee, State of Wisconsin, under the name and firm of Bishop and Company, of the first part, and the Green Bay, Milwaukee, and Chicago Railroad Company, by their president, Thomas P. Williams, duly authorized, of the second part, witnesseth: That the said first party, in consideration of the stipulations of the said second party, hereinafter set forth, hereby agrees and contracts to do the grading, bridging, track-laying, furnishing all the materials therefor (the iron to be fifty-six pounds per yard,) all to be done in a substantial and workmanlike manner, for a single-track railroad of that portion of the road of said second party extending from
73 the State line of the States of Illinois and Wisconsin, via the cities of Kenosha and Racine, to some suitable point in the city of Milwaukee, to be selected by said first party.

Said first party further agrees to furnish four suitable locomotives, eight eight-wheel passenger cars for sixty passengers each, three eight-wheel baggage cars, fifteen eight-wheel house freight cars, and ten eight-wheel platform cars, or twenty four-wheel gravel dump cars in lieu of such platform cars.

The said first party to have the use of said equipment and road until delivered up to said second party.

It is understood and agreed, that said first party are to complete said work and deliver it over to said railroad company on or before the 1st day of October, A. D. 1854: provided, nevertheless, that said first party shall not be compelled to complete and deliver up said work under this contract until such time as the Chicago and Milwaukee Railroad Company shall have completed their railroad from Chicago to the State line of Wisconsin, to meet the road of said second party at said State line.

It is also agreed and understood, that the detailed location of the portion of said road herein stipulated to be constructed shall be made according to the direction of said first party, and upon such line as said first party may elect, authorized by the charter of said company: provided, that no grade shall be adopted to exceed forty feet per mile, and no curve or less radius than sixteen hundred feet, without the consent of the chief engineer of said railroad company.

It is also understood and agreed, that the instalments on the
74 stock of said railroad company to be received by said first party under this contract are not to be paid except in work

and materials under this contract, unless said first party may elect to pay the same in cash; and said stock to be scrip or full paid stock, at the option of said first party.

The said second party, in consideration of the stipulations of said first party, hereinbefore set forth, hereby covenants and agrees to pay said first party the gross sum of eight hundred and eighty thousand dollars ($880,000,) as follows, to wit: two hundred and twenty thousand dollars in cash; two hundred and sixty thousand dollars in the capital stock of said railroad company; said stock to be scrip or full paid stock, at the option of said first party as aforesaid; and four hundred thousand dollars in the first mortgage bonds of said railroad company, which bonds are to be convertible (at the election of said first party) into the stock of said railroad company, at the option of the holders thereof, and to bear interest at the rate of not less than seven nor more than ten per cent. per annum, as shall be elected by said first party; which said interest is to be paid semi-annually, and both principal and interest to be paid at the "Broadway Bank," in the city of New York; said bonds not to exceed four hundred thousand dollars in all, on that portion of the road between Milwaukee and the State line; and said bonds are to be issued and printed in such sums of twenty-five dollars each, and not more than one thousand each, as said first party may elect; which said cash stock and bonds are to be paid and issued to said first party as fast as the work proceeds and the materials for construction and the equipments are purchased by said first party. But said first party shall be entitled to receive all or any part of said stock, bonds, or cash, by giving their receipt therefor, and by giving their obligation to secure the said second party against the payment of all interest due upon the same, until said stock, cash and bonds, are due the said first party under this contract.

It is further understood and agreed that said second party shall issue no stock, bonds, or obligations of said railroad company on said portion of said road, to any person or persons, except to those persons already having made subscriptions to the stock of said road, and only for the amounts already subscribed by each of said persons respectively, without the full consent in writing of each of the persons herein designated as composing the firm of Bishop and Company.

In testimony whereof, thesaid Ethan F. Bishop, William D. Bishop, John W. Stewart, and Levi Blossom, have hereunto set their hands and seals, and the said Thos. P. Williams, president of the Green Bay, Milwaukee and Chicago Railroad Company, has caused his signature and the corporate seal of said company to be hereunto affixed, at the

city of Milwaukee, the day and year first above written, in the presence of—

C. K. WATKINS.

E. FERRIS BISHOP. [SEAL.]
WILLIAM D. BISHOP, [SEAL.]
By E. F. BISHOP, *Att'y.*
JOHN W. STEWART. [SEAL.]
LEVI BLOSSOM. [SEAL.]

{ SEAL OF } { COMP'Y. }
THE GREEN BAY, MILWAUKEE & CHICAGO RAILROAD COMPANY,
By THOS. P. WILLIAMS, *President.*

76 DISTRICT OF WISCONSIN, *ss:*

Charles H. Wheeler, being first duly sworn, on oath says that he is the petitioner above named; that he has heard read and knows the contents of said petition, and that so far as the statements therein contained relate to this petitioner personally, his connection with said company, his knowledge of its proceedings, and his knowledge of the pendency of this suit, and his efforts to ascertain from the officers of said company, defendant, the facts as therein stated, and all other things therein stated in relation to himself personally and positively, are true to the knowledge of this petitioner; and that as to all the other matters in said petition stated, he believes them to be true, and believes he can, and is determined to attempt to establish their truth by legal and competent evidence, if allowed to appear and defend this suit in the name of said company.

He further says that the extracts from the books of said company stated in said petition are true to his own knowledge, and were made, together with other extracts, by his order, from said books in 1860, while this affiant was for a short time in possession of said books as a receiver, appointed by the circuit court for Milwaukee county.

CHAS. H. WHEELER.

Subscribed and sworn to before me this 2d day of June, 1862.
J. M. MILLER, *Clerk.*

DISTRICT OF WISCONSIN, *ss:*

Levi Blossom, being first duly sworn, on oath says that he has heard read and knows the contents of the foregoing petition
77 of Charles H. Wheeler; that he is the Levi Blossom therein named, and that he verily believes every allegation and statement therein contained is true; and that as to the statements therein contained relating to him, said Blossom, personally, they are true to his own knowledge.

That said exhibit No. 1, thereto attached, is a true copy of said contract as therein stated, and that the original contract is in his, said Blossom's, possession.

LEVI BLOSSOM.

Subscribed and sworn to before me this 2d day of June, 1862.
J. M. MILLER, *Clerk.*

Aff't of C. B. Hall, filed June 13, 1862.

U. S. district court, dis. of Wisconsin.

E. FERRIS BISHOP *et al.*
vs.
MILWAUKEE & CHICAGO RAILROAD COMPANY.

MILWAUKEE COUNTY, *ss:*

Charles B. Hall, being duly sworn, deposes and says, that in May, 1855, he was appointed superintendent and manager of the Milwaukee and Chicago railroad, and that ever since that time he has had charge of the operation and management of said road, and has been conversant with its affairs.

This deponent further says, that no part of the earnings of said road during the last five years have been applied in payment of the mortgage mentioned in the petition of Charles H. Wheeler, as having been executed by said railroad company to James J. Schofield, trustee, or to the payment of any of the bonds issued under the same.

78 That said mortgage was originally made with the intention of selling the bonds issued under it, and with the proceeds to take up the drafts, notes, and indebtedness mentioned and described in the bill of complaint in the above entitled cause as secured by the mortgage therein.

That said bonds were placed in the hands of Bishop & Co., as collateral security to the indebtedness secured by the mortgage in this cause, and that by a resolution of the board of directors of said company, passed June 22, 1858, they were placed in the hands of Horace Nichols, of Bridgeport, Conn., as trustee, and to be held by him for the purpose of being applied in payment of the floating debt of said company, being the same indebtedness secured by the mortgage in this case as will appear by the records of said company.

C. B. HALL.

Sworn to before me this 13th day of June, 1862.

ALFRED L. CARY,
Notary Public, Milwaukee Co., Wis.

Affidavit of A. V. H. Carpenter, filed June 13, 1862.

And there was an affidavit of A. V. H. Carpenter, filed June 13, 1862, as follows:

U. S. district court.

E. FERRIS BISHOP and others
vs.
MILWAUKEE & CHICAGO RAILROAD COMPANY.

DISTRICT OF WISCONSIN, *ss:*

79 A. V. H. Carpenter, being duly sworn, deposes and says that he is the secretary of the defendant, and has been since

June 22d, 1858, and have charge of its books and papers; that it appears from the records of said company that on the 24th day of April, 1854, on motion of Charles H. Wheeler, the pres't was authorized to issue drafts to Bishop & Co. to the amount of $40,000, in such sums as they might wish.

June 20th, 1854, said board, at a meeting at which said Wheeler was present as a director, $50,000 was so authorized to be issued.

August 20th, 1854, at such meeting Wheeler being present as a director, $50,000 more was so authorized to be issued. That the books show that such drafts were issued; that he has not had time to have said drafts through all the books, but that as he understands the matter, and so far as he has been able to examine into the affairs of said company, the drafts now outstanding and secured by the mortgage in this case include the drafts issued in renewal of said drafts, and that the greater part of the drafts so originally issued, or the drafts given in renewal of them, are now outstanding and constitute a large part of the indebtedness now secured by this mortgage. That the whole amount of indebtedness secured by this mortgage is the actual bona fide indebtedness of said company, and that it so appears on the books of said company, and that it has always been so regarded and treated by said company since this deponent has been connected therewith. That no part of the earnings of said road since June 22d, 1858, has been applied upon or in payment of any of the bonds issued under the Scofield mortgage; but that the income of said road during said time has been applied to the necessary operating expenses, and keeping said road in repair and
80 improvements thereon, and in paying the funded debts interest of the company, (other than said Scofield mortgage debt,) and such other liens upon said road as were a lien thereon, prior to this mortgage, and that the residue thereof has been applied to the payment of interest and principal of the demands secured by the mortgage in this case, and that after allowing for all payments so made on the drafts given by the company, which are secured by this mortgage, there was at the time of entering judgment on the law side of this court on said drafts actually due thereon, the several sums for which judgment was so entered.

That the whole amount of stock issued by said company, and now outstanding amounts to one million of dollars. That the complainants in this action have agreed upon a plan of reorganization of said company after a sale of said road, in which the rights of all the present stockholders are preserved and protected, which plan is fully detailed in the printed circular hereto attached, marked "A," and which has been assented to by all the officers of said company, and by the holders of seven thousand seven hundred and eighty-five of the ten thousand shares of said stock. That the committee appointed to perfect and carry out said plan, as this deponent is informed and believes, on or about the 29th of January last, sent said printed circular to every stockholder of said company, whose residence was known to them, or could be ascertained, and that all the responses thereto have been favorable, except that of the petitioner, Charles H. Wheeler—that his response was received early in February last, and is

hereto annexed, marked "B." That 550 shares of said stock, which has not been heard from, was held in New Orleans, and other
81 localities in the extreme southern States, when last heard from, and about 200 shares are held in Europe, from which no response has yet been received. That at the last annual meeting of said stockholders held at the office of the company in the city of Milwaukee, this foreclosure suit and said plan of organization was fully talked over and discussed, and unanimously approved and adopted. That said Wheeler was in town on that day, but did not attend said meeting.

That said Wheeler never applied to this deponent to examine said books, until some time during the month of May last. That he had previously told this deponent, in a threatening manner, that no change should take place in the present organization of said company, unless he could have par for his stock; and knowing that he was hostile to the actions which said company had resolved to take at its annual meeting, and believing he was trying to defeat it, this deponent did not desire to show him the books, or grant him any facilities for accomplishing his purpose, unless it was his duty so to do. That this defendant inquired of Cary and Pratt whether he should incur any penalty by refusing to let said Wheeler examine said books, and stated to them that he represented but $2,000 in amount of stock, and that they informed this deponent that he would not incur any penalty by so doing; that Cary and Pratt never in any manner interfered in said matter, or gave any direction therein, except as above. That, as this deponent is informed and believes, it is the intention of said complainants, if said road is sold, to have it reorganized upon the plan hereto annexed, marked "A," and in all respects to carry out the same.

A. V. H. CARPENTER.

Sworn to before me this 13th day of June, 1862.
82 ALFRED L. CARY,
Notary Public, Mil. Co., Wis.

83 (A.)

Whereas, in the district court of the United States of America for the district of Wisconsin, on the fifth day of December, A. D. 1861, upon a bill filed by E. Ferris Bishop and John W. Stewart, trustees, Iron Bank, Farmers' Bank, Pequonnoc Bank, The Patterson Iron Company, S. S. Robbins, William D. Bishop, W. J. Canfield, administrator of the estate of Lee Canfield, deceased, Charles Palmer, Frederick Schuchardt, Frederick C. Gebhard, Frederick Gebhard Schuchardt, Francis Vose, Charles L. Perkins, John B. Kittell, Morris K. Jesup, Salem H. Wales, J. W. Lewis, U. Jameson, American Exchange Bank, Corn Exchange Bank, and Charles L. Frost, against "Milwaukee and Chicago Railroad Company," by a decree of said court it was ordered, adjudged, and decreed, that there was due the said several complainants the sum of two hundred and fifty-four thousand one hundred and seventy-five dollars on their respective judgments,

acceptances, and mortgage in the said bill mentioned, for principal and interest; and that all and singular the franchises and property of the said corporation, "Milwaukee and Chicago Railroad Company," real and personal, including its railroad, and all its right of way, structures, depot grounds, and depot buildings, engines, cars, and all other property and rights of property at the date of said decree belonging to said company, or thereafter to be acquired, should be sold to pay and satisfy the said debt of two hundred and fifty-four thousand one hundred and seventy-five dollars, with interest and costs, and that the marshal of said district should make and execute to the purchaser a deed or deeds of the said mortgaged premises, and that thereupon the said defendant, and all persons claiming or to claim from or under said corporation, should be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part thereof:

And whereas it is the interest of the creditors, as well as the stockholders of the said company, that the said mortgaged premises should be sold under the said decree, and a new organization be effected under the laws of the State of Wisconsin; and, in order to protect the respective right of the parties interested, there should be concert of action among them, and an agreement designating the person or persons who should become the purchaser of the mortgaged premises at said sale, and some of the terms upon which the new organization should be effected and completed:

And whereas, at a meeting of the bondholders, stockholders, and creditors of the said company, held at the American Exchange Bank, in the city of New York, on the twenty-first day of January instant, at which meeting Benjamin M. Price, of Rahway, New Jersey, acted as the chairman, and Charles Palmer, of the city of New York, as the secretary, the following, among other resolutions, were passed unanimously, to wit:

1st. That it is the interest of all the creditors and stockholders of said company that the mortgaged premises should be sold under said decree.

2d. That the judgments against said company, and liens upon its property, should be paid and satisfied by an issue of preferred stock to a sufficient amount, at par value, for that purpose, which preferred stock should be entitled to a dividend of seven per cent. per annum from the net earnings of each current year, after payment of interest on all the mortgage bonds, if the company earn so much during the current year, and before any payment of dividends to any other class of stockholders; if the net earnings of the company are not so much in any one year, then the said preferred stock should receive for that year a dividend of whatever the said net earnings are, after payment of interest on the mortgaged bonds; and said preferred stock
84 should not have any claim upon the earnings of any other year for the non-payment of dividends of a preceding year.

3d. That the common stock be recognized at its present amount, or such less amount as shall be agreed upon.

4th. That Benjamin M. Price, of Rahway, New Jersey, B. Murray, cashier American Exchange Bank, New York, Albert Aikin, president Bank of Pawling, Dutchess co., New York, P. C. Calhoun, president Connecticut Bank, Bridgeport, Conn., Frederic Schuchardt, of the firm of Schuchardt & Gebhard, New York, Charles L. Frost, of the firm of Frost & Forrest, New York, Edward Weston, of the firm of Weston, Dortic & Co., of New York, and F. Vose, of New York city, be a committee to prepare articles of agreement for signatures by the proper parties in interest, and to procure signatures to the same, and that said committee appoint some suitable person or persons to become the purchaser or purchasers of the road under whom the new organization shall be effected, according to said agreement, and the several laws relating thereto:

Now, therefore, we, the undersigned, creditors of said company, to the amount respectively annexed our names, do hereby agree that the said mortgaged premises shall be sold under and by virtue of the said decree, and that the said Benjamin M. Price, B. Murray, Albert Aikin, P. C. Calhoun, Fredk. Schuchardt, Charles L. Frost, Edward Weston, and F. Vose, shall name and appoint some suitable person or persons who shall bid off the said mortgaged premises at the said sale, and become the purchaser or purchasers thereof, to carry out this agreement by a new organization under the laws of the State of Wisconsin;

And that the judgments against said company, and liens upon its property, shall be paid and satisfied by an issue of preferred stock to a sufficient amount, at par value, for that purpose, which preferred stock shall be entitled to a dividend of seven per cent. per annum from the net earnings of each current year, after payment of interest on all the mortgaged bonds, if the company earn so much during the current year, and before any payment of dividends to any other class of stockholders. If the net earnings of the company are not so much in any one year, then the said preferred stock shall receive for that year a dividend of whatever the said net earnings are after payment of interest on the mortgage bonds; and said preferred stock shall not have any claim upon the earnings of any other year for the non-payment of dividends of a preceding year.

And it is further agreed that the first mortgage bondholders (after having extended the time of payment of their bonds) shall be entitled to one share of scrip stock in the new company for each $100 of bonds held by them, the certificate of which shall be so framed as to accompany each bond, which stock may be voted upon at all meetings of the stockholders, but shall not be entitled to receive any dividends.

In the new organization, the stockholders of the present company shall be entitled to one share of common stock in the new company for every two shares of their present stock; but none but preferred stockholders and first mortgage bondholders holding scrip stock shall be eligible as directors of the new company until a dividend shall be declared on the common stock:

Provided, nevertheless, and this agreement is signed upon the ex-

press understanding, that the same shall be ratified by the stockholders at their next annual meeting, or at a meeting held for that purpose by the stockholders.

Dated January 29th, 1862.

85 (A.)

AMERICAN EXCHANGE BANK,
New York City, January 29th, 1862.

At a meeting of bondholders, stockholders, and creditors of the Milwaukee and Chicago Railroad Company, held at the American Exchange Bank, New York city, on the 21st of January inst., to make arrangements for reorganizing said company, a committee was appointed to mature terms of reorganization, to prepare the necessary agreement for signatures by the proper parties, and to appoint a proper person or persons to purchase the road and reorganize the same under the laws of Wisconsin. The committee so appointed are B. M. Price, pres't Farmers and Mechanics' Bank, Rahway, N. J.; P. C. Calhoun, pres't Connecticut Bank, Bridgeport, Ct.; B. Murray, cashier American Exchange Bank, New York city; Albert Akin, pres't Bank of Pawling, Dutchess county, N. Y.; Charles L. Frost, firm of Frost & Forrest, New York city; Fred'k Schuchardt, firm of Schuchardt & Gebhard, New York city; Edward Weston, firm of Weston, Dortic & Co., New York city; Francis Vose, New York city.

The committee has prepared the enclosed form of agreement for the signatures of the judgment creditors of the company under the decree of foreclosure granted by the United States court on the mortgage securing their claims.

Each judgment creditor receiving this circular will please sign the form of agreement herewith enclosed, and mail it to the committee, as addressed on the envelope enclosing the same.

Each stockholder receiving this circular (in case he cannot attend the stockholders' meeting in person) will please mail the enclosed proxy, duly signed, to the committee as addressed on the envelope enclosing the same. This proxy will be used by the committee to vote in stockholders' meeting in ratification of the enclosed form of agreement.

The committee is composed of parties interested in all classes of interest in the company, and the plan of reorganization indicated in the accompanying form of agreement is, in their judgment, the best one that can be adopted under the circumstances.

Per order of the committee.

BENJ. M. PRICE,
Chairman.
B. MURRAY,
Secretary.

86 Know all men by these presents, that do hereby constitute and appoint attorney and agent, with power of substitution, for , and in

name, place, and stead, to vote as proxy at the annual meeting of the stockholders of the Milwaukee and Chicago Railroad Company, to be held in February, eighteen hundred and sixty-two, and at any subsequent meeting to be called for the purpose of ratifying an agreement relative to the reorganization of said company, according to the number of votes should be entitled to vote if then personally present.

In witness whereof, have hereunto set hand and seal this 29th day of January, A. D. 1862.

Sealed and delivered in the presence of—

(B.)

Name.	Residence.	Amount.

MILWAUKEE, *Feb'y* 5, 1862.

DEAR SIR: Your circular enclosing power att'y, resolutions relative to reorganizing the M. and C. R. R. C., is received. I do not see any sufficient reason for the proposed arrangement, and shall oppose it.

Yours truly,

CHAS. H. WHEELER.

B. MURRAY, Esq.,
New York.

87 *Petition of Wheeler denied.*

June 11, 1862.—The petition of Charles H. Wheeler to vacate this decree, and for leave to make defence to the bill in the name of the Milwaukee and Chicago Railroad Company, defendant, and for such other and further relief as shall be agreeable to equity and good conscience, having been argued by counsel on the thirteenth day of June, 1862, with consent that the order thereon be made as of the last day of the term, to wit, June 11, 1862, and it having been shown to the court that the said Charles H. Wheeler was informed of the decree soon after it was made, it is considered by the court that the delay in presenting said petition is too great to authorize the court in taking jurisdiction of the same, and that the prayer of said petition be and hereby is denied.

Petition of L. Blossom.

July 9, 1862.—Petition of Levi Blossom to complete sale to him filed, as follows:

In district court of the United States for the district of Wisconsin.

E. FERRIS BISHOP and others
vs.
THE MILWAUKEE AND CHICAGO RAILROAD COMPANY. } In equity.

To the judge of the district court of the United States for the district of Wisconsin:

88 Humbly complaining, your petitioner, Levi Blossom, of Milwaukee, in the State of Wisconsin, and a citizen of the State of Wisconsin, respectfully represents:

That at the foreclosure sale, held according to advertisement, and in pursuance of the decree of foreclosure and sale made by this court in the above-entitled cause, held and had at the post office in the city of Milwaukee, in said district, on the 19th day of June, A. D. 1862, at two o'clock in the afternoon of that day, the marshal of said district duly opened said sale and offered for sale, then and there, to the highest bidder therefor, according to law, "all the franchises and property of the Milwaukee and Chicago Railroad Company, real and personal, in the State of Wisconsin, including its railroad, extending from the State line, through the cities of Kenosha and Racine, to its terminus in the city of Milwaukee, together with all the right of way of said railroad, and all structures and buildings thereon, including all depot grounds and depot buildings, turnouts and privileges, all wood along the line of said railroad, all engines, cars, and all other property and rights of property belonging to said company, except money on hand, and debts due to said company.

That thereupon the said marshal duly called for and invited bids for the railroad and other property and things so offered for sale, and stated, in connection with said invitation for bids, that said railroad, property, and other things, so offered for sale, were subject to a prior incumbrance, called first mortgage, for four hundred thousand dollars, and also another prior incumbrance of two hundred thousand dollars, called the Milwaukee city mortgage, being

89 subject to incumbrances prior to the mortgage being foreclosed in the above-entitled cause, in all of six hundred thousand dollars, and no more.

That Francis Vose, of the city and State of New York, bid for said railroad and other property and things so offered for sale the sum of fifty thousand dollars, and that thereafter one Price bid therefor the sum of seventy-five thousand dollars; and that thereupon and thereafter your petitioner offered and bid therefor at said sale the sum of two hundred and fifty thousand dollars, which said offer and bid of your petitioner was the highest and best bid made at said sale for said railroad and other property and things so offered for sale; and that no other or greater sum was offered or bid at said sale by other person or persons; and that it then and there became and

was the duty of said marshal to have struck off said property, railroad and other property and things so offered to be sold to your petitioner at and for the amount of your petitioner's said bid; but that, on the contrary thereof, the said marshal wrongfully adjourned said sale to the next Saturday, the 21st day of June, 1862, at the same place and time of day; and the said marshal did not then and there strike off said railroad and other property and things so offered to be sold to your petitioner, as he ought to have done.

That at the time and place to which said sale was so adjourned by said marshal, the said marshal again opened said sale, and read the notice for said sale; and that thereupon your petitioner offered and bid for said railroad and other property and things so offered for sale the amount and sum of two hundred and sixty-two thousand four hundred and eighty $\frac{12}{100}$ dollars, [blank filled May 6, 1863. M. H. C.] being the amount due on the decree, interests and costs of sale up to and, including said sale, as the said amount was
90 given and furnished to your petitioner on that day by the said marshal or one of his deputies; and that your petitioner then and there stated to said marshal that the amount so by him then and there offered and bid was the amount of said decree, interests and costs, as per the said statement of said marshal or his deputy, and that your petitioner then and there intended to, and then and there did, bid the full amount of said decree, interests and costs, be the same more or less; and that it then and there became, and was, the duty of said marshal to strike off said property and things so offered for sale to your petitioner, at and for the last amount so bid by him at said sale; but that, on the contrary thereof, the said marshal then and there neglected and refused so to do, but did then and there make proclamation that said sale was and should stand adjourned to and until some day in October, 1862, at same place and time of day; and your petitioner states and shows that the last sum so by him bid and offered at said sale was the highest and best sum bid therefor at said sale by any person, or persons, for said railroad and other property and things so offered for sale.

Your petitioner further states that afterwards, to wit, on the 21st day of June, 1862, at the city of Milwaukee, in said district, your petitioner sent his attorney, Kurtz Miller, esq., to said marshal to offer said marshal then and there, on behalf of your petitioner, to then and there comply with his said offer and bid; and your petitioner is informed by said Miller, and verily believes, that said Miller did, on behalf of your petitioner, offer said marshal, then and there, to comply with his said bid, but that the said marshal then and there informed said Miller that he should not receive said amount, and that it was entirely unnecessary for your petitioner to make formal tender of said amount.

Your petitioner further states that he made both of said bids,
91 so made by him, as hereinbefore stated, in good faith, and has been ever since, and is now, ready to comply with his said bid, and hereby offers to bring that amount into court as the said court shall direct.

Your petitioner therefore prays the aid of said court in the prem-

ises, and that said railroad, and other property and things, so offered for sale, may be adjudged and declared to belong to your petitioner on his complying with his said bid, as this court shall direct, and that said sale may be confirmed to your petitioner by said court, and that said marshal may be ordered to strike off said property to your petitioner, and to certify and return the facts to this court, and that thereupon the sale may be declared and ordered to be consummated, in such form and way as this court shall direct; and that said marshal be ordered to accept and receive from your petitioner the amount of his said largest bid, and to declare the said railroad and other property and things sold to your petitioner, and that said sale to your petitioner be confirmed by order of this court.

And that your petitioner may have such other, or further, or different relief, as the nature of his case may require, or as shall be agreeable to equity and good conscience.

MAT. H. CARPENTER,
Solicitor for Petitioner.
FINCHES, LYNDE & MILLER,
of Counsel.

DISTRICT OF WISCONSIN, *ss:*

Levi Blossom, being first duly sworn, on oath says that he is the petitioner above named; that he has heard read and knows the contents of the foregoing petition, subscribed by his solicitor on that behalf, and that the same is true, of his own knowledge.

LEVI BLOSSOM.

Subscribed and sworn to before me this 8th day of July, A. D. 1862.

FR. BLOODGOOD,
Court Com'r.

92 October 9, 1862.—Order of satisfaction filed as follows:

E. FERRIS BISHOP and JOHN W. STEWART, trustees. Iron Bank, Farmers' Bank, Pequonnoc Bank, The Patterson Iron Company, S. S. Robbins, William D. Bishop, W. J. Canfield, administrator of the estate of Lee Canfield, deceased, Charles Palmer, Frederick Schuchardt, Frederick C. Gebhardt, Frederick Gebhardt Schuchardt, Francis Vose, Charles H. Perkins, John B. Kettel, Mims K. Jesup, Salem H. Wales, J. W. Lewis, W. Jamison, American Exchange Bank, and Corn Exchange Bank,
vs.
MILWAUKEE AND CHICAGO RAILROAD COMPANY.

MILWAUKEE COUNTY, *ss:*

Satisfaction is acknowledged between the above-named parties, complainants, and the above named party, defendant, of a certain de-

cree of foreclosure and sale rendered by the district court of the United States for the district of Wisconsin, upon the chancery side thereof, in favor of said complainants, and against said defendant, for the sum of two hundred fifty-four thousand and one hundred and seventy-five dollars, principal and interest, and the further sum of forty-eight and $\frac{36}{100}$ dollars for costs, on the 5th day of December, A. D. 1861.

CARY & PRATT,
Solicitors for Complainants.

93 Taken and acknowledged before me this 9th day of October, A. D. 1862, by the said Cary & Pratt, to me known to be the solicitors of the complainants in the said above-entitled cause wherein said decree was entered.

E. G. MAYHEW,
Notary Public, Mil. Co., Wis.

Marshal's report.

January 6, 1863.—This day came the marshal and made report as follows:

In the United States circuit court for the district of Wisconsin.

E. FERRIS BISHOP and JOHN W. STEWART, trustees, Iron Bank, Farmers' Bank, Pequonnoc Bank, The Patterson Iron Company, S. S. Robbins, William D. Bishop, W. J. Canfield, administrator of the estate of Lee Canfield, deceased, Charles Palmer, Frederick Schuchardt, Frederick C. Gebhard, Frederick Gebhard Schuchardt, Francis Vose, Charles L. Perkins, John B. Kettel, Morris K. Jesup, Salem H. Wales, J. W. Lewis, W. Jamieson, American Exchange Bank, Corn Exchange Bank, and Charles L. Frost
vs.
MILWAUKEE and CHICAGO RAILROAD COMPANY.

I, Darius C. Jackson, marshal for the district of Wisconsin, hereby report, that in pursuance and by virtue of a decree made by the district court of the United States for the district of Wisconsin on the 5th day of December, A. D. 1861, as directed in said decree, I gave notice of the time and place of sale by publication once in each
94 week for three months in the New York Evening Post and in the Milwaukee Sentinel, newspapers published in the city of New York and in the city of Milwaukee; and I did at the time mentioned in said printed notice, to wit, on the sixth day of June, A. D. 1862, at three o'clock p. m., at the post office in the city of Milwaukee, then and there offer for sale the premises described in said

decree, as follows, to wit: All the franchises and property of the Milwaukee and Chicago Railroad Company, real and personal, in the State of Wisconsin, including its railroad extending from the State line through the cities of Kenosha and Racine to its terminus in the city of Milwaukee, together with all the right of way of said railroad, and all structures and buildings thereon, including all depot grounds and depots, buildings, turnouts, and privileges, all wood along the line of said railroad, all engines, cars, and all other property and rights of property belonging to said company except money on hand and debts due to said company; and no bids being received by direction of complainants' solicitors I adjourned said sale to Thursday, the 19th day of June, A. D. 1862, at the same hour and place as aforesaid. And I further report, that at the time and place mentioned I again offered for sale the property above described, and, among others, received the following bid for said property from Levi Blossom, to wit: the sum of two hundred and fifty thousand ($250,000) dollars, that being the highest and best bid offered at said sale. By direction of the complainants' solicitors I again adjourned said sale to Saturday, the 21st day of June, A. D. 1862, at the same hour and place as previously offered, and gave notice that the said sale would be opened with a bid of two hundred and fifty thousand ($250,000) dollars, as so aforesaid offered for the property, as above described.

And I further report, that at the time and place before men-
95 tioned I again opened the said sale for the purpose of adjourning the same to Wednesday, the first day of Obtober, A. D. 1862, when, and before said sale was so adjourned, the following bid was made by Levi Blossom for said property hereinbefore described, to wit: the sum of two hundred and sixty-two thousand four hundred and eighty $\frac{12}{100}$ (262,480 $\frac{12}{100}$) dollars. By direction of the complainants' solicitors said sale was again adjourned to the time and place before mentioned. And I further report, that on Wednesday, the first day of October, A. D. 1862, at 3 p. m., I again opened said sale, and by direction of the complainants' solicitors further adjourned said sale to Thursday, the fifteenth day of January, A. D. 1863, at the same hour and place as previously offered. And I further report, that after said sale was so adjourned, and previous to the said 15th day of January, A. D. 1863, I was ordered by the complainants' solicitors to discontinue the said sale, being informed by them that the Milwaukee and Chicago Railroad Company had paid to said complainants the amount of said decree; whereupon, as ordered, I discontinued the said sale.

D. C. JACKSON,
U. S. Marshal.

Affidavit of John W. Cary.

And afterwards, to wit, on the sixth day of May, A. D. 1863, the following affidavit was filed:

U. S. district court, district of Wisconsin.

E. FERRIS BISHOP *et al.*
vs.
MILWAUKEE and CHICAGO RAILROAD COMPANY.

COUNTY OF MILWAUKEE, *ss:*

John W. Cary, being duly sworn, deposes and says, that
96 he is one of the firm of Cary & Pratt, who, as solicitors, prosecuted and had charge of the foreclosure in this case; that at the time the property described in the complaint in this cause was offered for sale by the marshal on the 19th day of June, 1862, Benjamin M. Price, of Rahwanay, New Jersey, was present as an agent of the stockholders of said company, duly authorized to act for them and on behalf of said defendant, and that he was instructed by them to make some arrangement by which their interest therein and the stock of said defendant should be protected; that after said property was offered for sale, and after several bids had been *been* made, said Price, fearing that if a sale should be completed that said stock would be wholly sacrificed and the interest of said stockholders lost, applied to said Cary & Pratt, who were superintending and directing said sale on the part of the complainants, to postpone said sale for a short time, for the purpose of enabling said defendant and said stockholders to make some arrangement by which the mortgage debt might be paid without a sale of said property; that thereupon, and in pursuance of said request, said Cary and Pratt, as such solicitors, directed said marshal to postpone said sale for two days at the same hour and place, and in pursuance of such direction said sale was so postponed; that during said two days negotiations were had between said mortgage creditors and said defendant and its stockholders whereby arrangements were made to pay said mortgage debt and prevent a sale of said mortgage property, and said Cary & Pratt, in pursuance of said arrangement, directed said marshal to postpone said sale until the first day of October, 1862, to enable said defendant and its stockholders to carry out said arrangement and pay said mortgage debt, and that said sale was further postponed by direction of said Cary & Pratt to enable said arrangements to be carried out and completed;
97 that on the 9th day of October, 1862, said defendant paid the decree in this case in full, principal and interest, partly in bonds of said company and partly in cash, which bonds and cash were received by all of said creditors in satisfaction of their mortgage debt, and on the same day said Cary and Pratt, by the direction of said crediters, satisfied and cancelled said decree of record; that said company defendant now has, and since the said 9th day of October has had, full and exclusive possession of said mortgaged property, and, as this deponent is informed and believes, said stock is of the value of nearly or quite half a million of dollars.

And this deponent further says, that on the 19th day of June, 1862, one Charles H. Wheeler filed his bill of complaint in this court against

the complainants in this action, alleging that their mortgage debt was inequitable against said defendant; that he was a stockholder therein that his stock would be sacrificed by said sale, and praying that said sale might be staid; and that attached to said bill of complaint was an affidavit voluntarily made by said Levi Blossom, verifying the truth of some of the allegations of said bill of complaint. That said bill of complaint was signed by Mat. H. Carpenter, as solicitor, and by Finches, Lynde, and Miller, as counsel, and that said solicitor and counsel, on the said 19th day of June, procured from the district judge of this court an order fixing the time of hearing said application for the 21st of June, at an hour prior to the time to which said sale was postponed by said marshal, and at the time appointed for said hearing said Mat. H. Carpenter, esq., and Asahel Finch, esq., appeared before said district judge to procure said stay, and proposed to argue the same, when they were informed that said sale was not to
98 take place, but was to be still further adjourned.

And further this deponent says not.

JOHN W. CARY.

Sworn before me May 6th, 1863.

J. M. MILLER, *Clerk.*

Petition of L. Blossom denied and prayer for appeal.

And afterwards, to wit, at a stated term of said court, begun and held on the first Monday of January, A. D. 1863, in the city of Milwaukee, and on the fourteenth day of said term, to wit, on the seventh day of May, A. D. 1863, the following proceedings were had, to wit:

E. FERRIS BISHOP *et al.*
vs.
MILWAUKEE AND CHICAGO RAILROAD COMPANY. } In equity.

This day came Levi Blossom, and the complainants, by their counsel, and the petition of the said Blossom was heard by the court; and thereupon, upon consideration thereof, it is ordered, adjudged, and determined by the court now here, that the said petition be, and the same hereby is, refused and denied.

And in open court the said Levi Blossom prayed an appeal to the Supreme Court of the United States from the decision, order, and determination of this court, denying said petition, which appeal is hereby allowed.

And it is ordered that the said Levi Blossom file a bond for costs of said appeal in the sum of five hundred dollars, to be approved by the judge of this court. And it is further ordered that copies of the record and all proceedings in this cause be certified on said appeal to the said Supreme Court.

Appeal bond.

99 June 22, 1863.—Two appeal bonds of Levi Blossom, with Lyndsey Ward as surety, in the penalty of $500 each, approved by the judge and filed, which bonds are as follows :

Know all men by these presents that we, Levi Blossom, as principal, and Lindsay Ward, as surety, of Milwaukee, in the State of Wisconsin, are firmly held and bound unto the Milwaukee and Chicago Railroad Company in the sum of five hundred dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Signed with our hands and sealed with our seals this 8th day of June, A. D. 1863.

Provided, however, that this obligation is upon the following condition, to wit:

Whereas, in a suit lately depending in the district court of the United States for the district of Wisconsin, in equity, in which the said E. Ferris Bishop and John W. Stewart, trustees, Iron Bank, Farmers' Bank, Pequonnoc Bank, The Patterson Iron Company, S. S. Robbins, William D. Bishop, W. J. Canfield, administrator of the estate of Lee Canfield, deceased, Charles Palmer, Frederick Schuchardt, Frederick C. Gebhard, Frederick Gebhard Schuchardt, Francis Vose, Charles L. Perkins, John B. Kettell, Morris K. Jesup, Salem H. Wales, J. W. Lewis, W. Jamieson, American Exchange Bank, Corn Exchange Bank, and Charles L. Frost, were complainants, and the Milwaukee and Chicago Railroad Company, was defendant, an order was made by said court overruling and denying the petition of the said Levy Blossom, in which petition said Blossom, among other things, prayed said court to be declared the purchaser of the railroad and other things decreed to be sold in said suit; and whereas the said Levi Blossom has obtained an appeal and filed a copy
100 thereof in the clerk's office of the said court to reverse the said order in the aforesaid suit, said appeal having been granted to said Blossom in open court at the same term at which said order was made by said court:

Now the condition of the above obligation is such, that if the said Levi Blossom shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea appeal good, then the above obligation to be void, else to remain in full force and virtue.

LEVY BLOSSOM. [SEAL.]
LYNDSEY WARD. [SEAL.]
[SEAL.]

Sealed and delivered in presence of—
H. M. HARTWELL.

This bond and the surety thereto approved by me this 22d day of June, 1863.

A. G. MILLER, *District Judge.*

Know all men by these presents that we, Levi Blossom, as principal, and Lindsay Ward, as surety, of Milwaukee, in the State of Wisconsin, are firmly held and bound unto E. Ferris Bishop and John W. Stewart, trustees, Iron Bank, Farmers' Bank, Pequonnoc Bank, The Patterson Iron Company, S. S. Robbins, William D. Bishop, W. J.

Canfield, administrator of the estate of Lee Canfield, deceased, Charles Palmer, Frederick Schuchardt, Frederick C. Gebhardt, Frederick Gebhardt Schuchardt, Francis Vose, Charles L. Perkins, John B. Kettel, Morris K. Jesup, Salem H. Wales, J. W. Lewis, W. Jamieson, American Exchange Bank, Corn Exchange Bank, and Charles L. Frost, in the sum of five hundred dollars; for the
101 payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators firmly by these presents.

Signed with our hands and sealed with our seals this 8th day of June, A. D. 1863.

Provided, however, that this obligation is upon the following condition, to wit:

Whereas, in a suit lately depending in the district court of the United States for the district of Wisconsin, in equity, in which the said E. Ferris Bishop and John W. Stewart, trustees, Iron Bank, Farmers' Bank, Pequonnoc Bank, The Patterson Iron Company, S. S. Robbins, William D. Bishop, W. J. Canfield, administrator of the estate of Lee Canfield, deceased, Charles Palmer, Frederick Schuchardt, Frederick C. Gebhardt, Frederick Gebhardt Schuchardt, Francis Vose, Charles L. Perkins, John B. Kettel, Morris K. Jesup, Salem H. Wales, J. W. Lewis, W. Jamieson, American Exchange Bank, Corn Exchange Bank, and Charles L. Frost, were complainants, and the Milwaukee and Chicago Railroad Company was defendant, an order was made by said court overruling and denying the petition of the said Levi Blossom, in which petition said Blossom, among other things, prayed said court to be declared the purchaser of the railroad and other things decreed to be sold in said suit; and whereas the said Levi Blossom has obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the said order in the aforesaid suit, and appeal having been granted to said Blossom in open court at the same term at which said order was made by said court:

Now the condition of the above obligation is such, that if the said Levi Blossom shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea appeal good,
102 then the above obligation to be void, else to remain in full force and virtue.

LEVI BLOSSOM. [SEAL.]
LYNDSEY WARD. [SEAL.]

Sealed and delivered in presence of—
H. M. HARTWELL. [SEAL.]

This bond and the surety thereto approved by me this 22d day of June, 1863.

A. G. MILLER,
Dis. Judge.

103 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, John M. Miller, clerk of the district court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file, and remaining of record in my office, being a full and complete exemplification of the record and proceedings in the suit of E. Ferris Bishop *et als. vs.* Milwaukee and Chicago R. R. Company.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the said United States the eighty-eighth.

[SEAL.]

J. M. MILLER, *Clerk.*

Filed 12th November, 1863.

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Supreme Court of the United States.

No. 72.—DECEMBER TERM, 1865.

LEVI BLOSSOM, Appellant,

vs.

THE MILWAUKEE & CHICAGO R. R. CO.

BRIEF FOR APPELLANT.

MATT. H. CARPENTER,

Counsel.

Starr & Son, Law Printers, Milwaukee.

1673

Supreme Court of the United States.

No. 72.—December Term, 1865.

LEVI BLOSSOM, Appellant,

vs.

THE MILWAUKEE AND CHICAGO R. R. CO.

A suit was commenced on the equity side of the District Court of the United States for the district of Wisconsin, by E. Ferris Bishop and others, against the Milwaukee and Chicago Railroad Company, to foreclose a certain mortgage set forth in the record. The cause proceeded to final decree of foreclosure and sale, December 5, 1861.—Record, 27.

The marshal advertised the sale for the 6th day of June

1862, and on that day offered the premises to the highest bidder, in pursuance of the decree: no bids being received, the sale was adjourned to June 19, 1862. On this day various bids were made, Blossom, the appellant, bidding $250,000, which was the highest and best bid made on that day for the premises. By direction of the complainants' solicitor, after Blossom's bid and without his consent, the Marshal again adjourned the sale to June 21, 1862, and gave notice that the sale would be opened with a bid of two hundred and fifty thousand dollars, (250,000) so as aforesoid offered for the property.—Record, 58.

At the adjourned day, June 21, 1862, the Marshal opened the sale, and Blossom advanced his bid to the full amount of the complainants' debt and cost, and expenses of sale, $262,480.12. The sale was then again adjourned to October 1, 1862, by direction of complainants' solicitor, and October 1, the Marshal opened the sale, and, by like direction, again adjourned it to January 15, 1863; and after this last adjournment, the Marshal was directed by the complainants' solicitor to discontinue the sale. These facts are all reported to the Court by the Marshal.—Record, 57, 58.

Blossom applied to the Court by petition, July 9, 1862, to have the sale of the mortgaged premices confirmed to him, on his bid of $262,480.12, made June 21, 1862.

This was resisted by the complainants upon the ground set forth in the affidavit of Mr. Carey.

The Court sustained the objection and denied the pettition. Blossom appealed to this Court.

Petition, Record page 54.

Marshal's Report, Record page 57.
Affidavit of Cary Record page 59.
Motion denied, Record page 60.

The ground upon which Blossom's petitions was denied, was that after the bid was made, and Blossom had remained liable upon it from June to October, *the parties to the cause without his knowledge or consent, and without the leave or intervention of the Court, satisfied the decree of record, and directed the Marshal to discontinue the sale.* The validity of this proceeding of the parties, rests upon the assumption that the owner of the decree can control and even suspend its execution, after the rights of a bidder have attached: thus extinguishing those rights without his consent, without compensation for his injury, and without action by the Court, at any time before the sale is confirmed. By the soundness or unsoundness of this proposition the proceedings in the Court below must stand or fall.

On a motion to dismiss this cause, the Court said: "A "purchaser or bidder at a master's sale in Chancery subjects "himself *quoad hoc* to the jurisdiction of the Court, and can be "compelled to perform his agreement specifically. It would seem "that he must acquire a corresponding right to appear and "claim at the hands of the Court, such relief as the rules of "equity proceedings entitle him to."

1 Wallace 656.

I.

WHAT THEN ARE THE RIGHTS WHICH A PURCHASER, A STRAN-

GER TO THE SUIT, ACQUIRES BY MAKING A BONA FIDE BID WHICH HE OFFERS TO PERFORM BY PAYMENT TO THE MARSHAL.

To answer this question we must consider the chractor of foreclosure sales under decree in chancery. The mortgagee asks the Court to take to itself the mortgaged premises, and hold or dispose of them for his benefit. This the Court does, either by appointing a receiver of the rents and profits, in which case the possession of the receiver is the possession of the Court, "the Court being regarded as the landlord," or by ordering the property to be sold to raise the amount due. "A decree for a sale "to effect a partition, or to pay debts, *virtually takes possession of the estate and vests it in the Court for the purpose of distribution.*"—*Williams' case*, 3 *Bland*, 215. See, also, Sherwin vs. Vancerherst, 4 Cond. Ch., 461. The rights of all parties in the property are merged in the decree, and possession is vested by the decree of sale in the Court, for the purpose of enabling it to sell the property and give possession. The parties have no longer any control over the property.

In Andrews vs. Scotton, 2 Bland, 636 to 657, the nature of judicial sales is elaborately discussed, and many authorities cited. It is there held that in the contract of sale *the Court is the party vendor*, and has the vendor's lien, &c., &c.; and the chancellor distinguishes sales of specific property under a decree in chancery from sales on execution, where the Court has not determined what property shall be sold, in which case the officer and not the Court is the vendor.—2 Bland, 636 to 657.

See, also, Anderson vs. Foulke, 2 Har. & G. 346.

In Snyder v. Stafford 11 *Paige* 76, the chancellor says:

"Both parties appear to have fallen *into the very common error* "of supposing that the owner of the decree had the right to "control the action of the master, and to direct which parcel "should be first sold." *In Kelly v. Israel* 11 *Paige* 147, it was held that the complainant in whose favor a decree had been rendered in a foreclosure cause could not control its execution to the prejudice of other parties interested; and that defendants might apply to the Court to have the execution of the decree committed to them, if the complainant unreasonably neglected to proceed to a sale.

In Collier v. Whipple 13 Wend 229, Nelson, J. speaking of sales by master in foreclosure causes, says: "I am aware "that these officers usually follow the direction of the plaintiff, "or his solicitor in this respect, and their interest perhaps may "lead them to do so, as they are usually selected by the par- "ties, *but there is nothing in the nature of the office, or the "duties belonging to it, which puts them under the control of "the parties.* The interposition of an officer to sell the property "of defendants at auction would be a useless ceremony *if the "officer was to be under the direction of the plaintiff.* If the "master is not only independant of the party, but bound to "execute the functions of his office, I should like to know upon "what principle, the bid of a party, or his solicitor, can be at "all sustained. The party would be substantially both auctioneer "and bidder."

In Breese v. Busby 13 How. Pr. Rep. 488, the Court speaking of a referee to sell under foreclosure judgment, say: "Hav- "ing determined to sell in parcels, it was for him to determine

"the order of sale, and in doing so he was bound to regard the "rights of the parties, and not the directions of the plaintiff. *He* "*was an officer of the Court, having a discretion to exercise, and* "*was not the mere servant of the plaintiff.*"

In Nelson v. McDonald 6, J. Ch. 201, and in Baring v. Moore 5 Paige 52, it was held that an officer conducting a sale must exercise his own discretion, and could not excuse oppressive conduct upon the ground that he had acted under the directions of the plaintiff. In Sewell v. Costigan 1, Md. Ch. Decis., it is said by the Chancellor. "Gough the trustee by whom this sale was made, un- "der the authority of a decree of this Court, *is it's mere officer* and "agent. * * *In fact the sale made by him, is the sale* "*of the Court*, he being the mere instrument or agent *by whose* "*hand the Court acts.* It is the sale of the Court and not his "sale." &c.

In Harrison v. Harrison 1, Md. Ch. Decis, 331, it is held that in sales made by trustees under decrees in chancery the Court is the *vendor* and the trustee its mere agent acting under delegated authority.

In Dixon v. Pyne 7, Hare 332, it is said: The sale of an "estate is distinguished from the common case entitling a plain- "tiff to the carriage of a decree which he has himself obtained.

In sales under decrees according to to the English practice, there is no such thing as striking off, or knocking down the property. The bids are received and the best bid is reported to the Court. The form of a report is given in Bennets Master, page 125, as follows: "George Ansley attended the sale, &c.." *and*

offered to give for the purchase of &c; "and no person having "offered to give more for the said," &c. "*I do allow* the said "George Ansley to be the best purchaser thereof." &c., &c.

In all the English cases the language is, "A. B. having been "reported the best bidder or purchaser."

In Blount vs. Blount 3 Alk. 637, Lord Hardwich says: "Where "estate for lives have dropt in between a persons being report- "ed the *best* purchaser by the master, and his taking posses- "sion," &c. Showing that the master does not pretend to strike off the property, but simply reports the facts to the Court.

Ex-parte Manning 2 Peere Wilkins. 410.

These authorities abundantly show that after a Court of Equity has taken property into its own possession for the purpose of sale, that it is the Court, and not the parties, that makes the sale: it is the Court that enters into contract relations with strangers to the suit, whom it invites by its advertisement, to become purchasers of the property. It follows, that it is of no consequence whether the Marshal strikes off the property or not: all the authorities show that he cannot thereby complete the sale, but that it must be confirmed by the Court. In sales on execution the officer completes the sale, and therefore it is the striking off of the property that evidences its consummation. But in a sale under decree, the officer need only report to the Court who is the highest and best bidder.

It is immaterial whether the forms of a sale have been complied with or not, if the Court can see that substantial justice has been done. In Harrison v. Harrison, 1 Ma., Ch. Decis. 334, it was heldthat the neglect of the master to report the sale to the

Court, did not defeat the sale. The chancellor says; "Next it "is objected, that the trustee, did not make a report of his "sales as directed by the decree. But I apprehend the title of "the purchaser cannot depend absolutely upon the performance "by the trustee, of this part of his duty. If it did, it is "obvious that in many cases from death and other causes, the "title of purchasers might be defeated, this Court may, I think, "if satisfactorily convinced that a sale has been made by its "agent, though that agent has not informed it, in the mode "directed, that is by report, approve and ratify the sale." And in Brown v. Frost, 10 Page 243, and Mott v. Wakely 3d Ed. Ch. 590, when the master had made false reports, the Court set them aside and confirmed the sale to the real purchasers.

It seems unnecessary to produce authorities to show that the parties cannot interfere to discharge or defeat this contract which is entered into between the Court and the purchaser.

Hoffman's Master in Chancery, p. 217, says, that before sale has been opened it may be continued by consent of parties: or, *for cause*, after the biddings have been opened: but adds:

"But I conceive that the advertisement is a contract with "every bidder, a stranger to the suit, that he shall have the "property, unless there is a fair advance upon the sum offered "by him. Therefore, the master never should adjourn a sale once "opened upon a fair bid of a stranger without his consent.

"for the bidder has at least a right to say, he is the purchaser, "unless the Court on application will open the biddings: a "course our court seems to be averse to take.

"But I consider him so fully the purchaser in such a case, "that the master never could set up the premises again with- "out direction of the court," &c.

It is submitted that, if the purchaser who offers to perform a bid by payment to the Marshal acquires any right whatever, as this court held on the motion to dismiss this cause, he does, it is the right to have the property unless there is a fair advance, "upon the sum offered by him:" and that this right rests in contract between the Court and the purchaser and cannot be defeated or extinguished by the parties to the cause, without the consent of the purahaser.

In Brown vs. Frost 10 Paige 243, it was claimed to be a rule of chancery that the right of redemption remains after the biddings until the sale was confirmed by the Court. The chancellor says, page 246: "If such a rule exists, it is one which "I never heard of before; and no such right has ever been "claimed, by the owner of mortgaged premises in any suit or "proceeding before me, during the fifteen years in which I have "presided in this Court. Again on p. 247, the Chancellor says "*The former owner of the equity of redemption cannot prevent "the completion of the sale, and the confirmation of the report, by "tendering or offering to pay the amount of the decree, with in- "terests and costs.*"

II.

The remedy of the purchaser is by petition to the Court, as

made in this cause, for leave to perform his bid, and for confirmation of the sale to him.

In Baring v. Moore, 5 Paige 48, a sale of premises having been set aside and a resale ordered provided the sum of $3500 should be offered for the mortgaged premises, one Tyler appeared at the sale and offered $3500, which was the highest and best sum bidden for the premises; but the master demanded specie which Tyler could not pay, and no other person offering that sum in specie, the master reported the re-sale had failed for want of a bid for the sum named. But on the petition of Tyler, the Court set aside the report, and ordered the master to report Tyler the purchaser and make deed to him on payment of the sum of $3500.

In Mott v. Wakely, 3, Ed. Ch. 590, at the sale of mortgage premises, one Smith made the highest bid for the property, but by some sharp practice was pevented from complying with his bid at the time, and the master put up the property and sold it to another for a less sum and reported the sale accordingly. On petition of Smith the Court set aside the report, and ordered that Smith be permitted to complete his bid, and that the sale be confirmed to him.

III.

This petition must be determined upon the facts as they existed when the petition was filed.

Coster v. Turner, 1, Russell & Mylne 311.

At that time the decree was in full force; at a sale regularly held, Blossom had bid the full amount of the decree, principal

interest and costs, the very amount to produce which, the Court had ordered the property sold; and came into Court asking to perform his bid and have sale confiirmed. The rights of Blossom as a purchaser were then vested. He had done all that could be required of him, and was entitled to the property. He had done what the Court in Clason v. Corley, 5, Sandf. 451, say was necessary; he had "followed up his tender by a motion to the Court, to pay his money into Court," &c. It was not in the power of the parties to the cause by any subsequent proceedings of their own, out of Court, and without his consent, to divest his rights existing when the petition was filed.

IV.

All contracts should be mutual; and Courts should set the example by performing their own engagemente. Blossom by his bid subjected himself to the jurisdiction of the Court in all things pertaining to his bid and the property; the Court could have compelled him by attachment to perform his part of the contract or in case he refused, or was unable to do so, might have ordered the property resold at his risk, holding him liable for any deficiency.

Millikin v. Millikin, 1 Blend, 541.
Harding v. Harding, 4 Mylne & C. 514.
Gray v. Gray, 1 Beav. 199.

This compelled Blossom to keep this large sum at command to meet his bid. Good faith and public policy require that he should be protected in the corresponding rights acquired by him as a purchaser.

The language of Nelson J. in Collier v. Whipple, 13, Wend

231, is applecable here. "We are not laying down a rule merely "for this particular case, but one which will be the guide, not on- "ly to all these officers, but of every officer whose duty it is to "sell the property of the unfortunate at auction." Blossom made a *bona fide* bid for this property, to the full amount of decree, interest and cost, tendered preformance to the marshal, and came into Court asking to be permitted to preform his bid and have the property. If this Court shall hold that he acquired no rights by so doing, that the complainants had the right to control the marshal and continue the sale from time to time, at their pleasure, until the purchaser should be ruined by keeping his money at command, what *bona fide* bidder will ever again incur the hazard and inequality of such a rule, by bidding for property hereafter offered for sale by a federal Court?

The right claimed by the complainants would put every railway corporation in the west in the power of its incumbrancers and enable them to acquire its property at their own price. For if they have the power to adjourn the sale once they may a hundred times, until every competing bidder is ruined, or consents to withdraw from the biddings, and then the complainants may buy for whatever they may choose to give.

No doubt the officer, under proper circumstances, may continue a sale, but such continuance must be made because the officer, in his discretion deems it proper, and not because the owner of the decree directs it. In this case it is manifest from the marshal's report that he regarded himself as a mere agent of the complainants, and that he did not make any of the numerous adjournments from an exercise of his own judgment. Every adjournment of the sale,

after the first, for want of bids, the marshal reports to have been "made by direction of complainants' solicitor," that is, *because the solicitor so directed.*

V.

It is, of course, conceded that the purchaser buys subject to the power of the Court to open the biddings, *according to the course of practice in Courts of Equity.* This is a condition, and is the only one, implied in the contract of sale. WHAT ARE THE CAUSES WHICH INDUCE A COURT OF EQUITY TO OPEN THE BIDDINGS?

Nelson, J., in Collier v. Whipple 13 *Wend.* 226, speaking of the distinction in this respect between the rule in the equity Courts of New York and in England, says: "In England the advance offered under the circumstances would be sufficient of it-"self to justify the order of the Court below [opening the bid-"dings] but that court does not profess to act upon English "practice, *and in my judgment for sound and conclusive reasons,* "Vide 2 Paige 99. Before confirmation it is a matter of course "in England to open the biddings upon an offer of a reasonable "advance on the amount bid, *and indemnity to the purchasers.* "Newl. Pl. 168. *After confirmation* the rule is more strict, and "depends more or less upon the circumstances of the particular "case. This is the practice of our Courts; and cases in Eng-"land of applications to open biddings, *after confirmation of sale,* "may serve to throw light upon the question here."

The American doctrine upon this subject is summed up as follows in *Tripp v. Cook* 26 *Wend.* 157: "In order to carry in-"to effect the object of such sales, and to secure reasonable "competition and confidence amongst bidders, it is also necessa-

"ry that Courts should refrain from disturbing the rights ac-
"quired by or under purchasers at a fair public sale, *however*
"*inadequate the price*; where the parties interested, having due no-
"tice, have yet neglected or *been unable to protect their interests.*
"*Mere lowness of price ought not to furnish a sufficient reason*
"*to set aside sales*, because if this were allowed, a great induce-
"ment to bidders would be taken away, wealthy and sure bidders
"would be excluded, and the bidding left to those who took the
"chance of doubtful speculation. Lord Eldon's experience during
"half a century of the practice and administration of equity led
"him to condemn the English custom of opening biddings, even
"at sales much less dependent upon a public competition than
"ours, as having caused many estates to be thrown away from
"the uncertainty of the sale, and the expectation of an opening
"of the bidding. It is therefore a wise rule of general expedi-
"ency especially under our system of sales at auction, that the
"court of chancery, as the common guardian of all the parties
"in each case, and at the same time of all similar interests, pres-
"ent and future, should consider every fair sale as final; accord-
"ingly Lord Eldon thought *Morris v. Bishops of Durham*, 1
"*Ves. Jr. R.* 57, that the only case in which biddings should
"be reopened, was when there was some fraud or misconduct in
"the purchaser, or fraudulent negligence in another person, of
"which it would be against conscience that the purchaser should
"take advantage. This strict rule he relaxed farther in an after
"case, *White v. Wilson* 14 *Ves. Jr. R.* 151, by allowing a
"surprise created by the conduct of the purchaser to be valid
"ground of relief. Chancellor Kent acknowledged the validity
"of this ground, and granted similar relief upon it, but added,

"" I do not lay any stress upon the alleged inadequacy of price: "" such a ground alone, unattended with other circumstances is "" not sufficient."" Williamson v. Dale, 3 Johns. Ch. R. 290."

To the same general effect, and clearly establishing the doctrine that no sale should be disturbed for mere inadequacy of price, but only upon the ground of fraud or surprise, or other special circumstances, the following cases are cited.

Collier v. Whipple, 13 Wend. 226.
Duncan v. Dodd, 2 Paige, 99.
Andrews v. Scotten, 2 Bland. 629.
Young v. Teague, 1 Bailey, Eq., 14.
Seaman v. Riggins, 1 Green (N. J.) 214.
Williamson v. Dale, 3 John., Ch. 290.
Gordon v. Sims, 2 McCord Ch. 158.
The Am. Ins. Co. v. Oakley, 9, Paige 259.

But in the case at bar, there was no attempt to open the biddings, nor cause shown; no surprise claimed, no fraud imputed, *no one offered an advanced.* The sale was regular, the bid made in good faith; and the Court refused to confirm the sale, not for any legal reason, but because the parties had pretended to settle and discharge the decree, making no provision for the damage sustained by the purchaser.

In Duncan v. Dodd, 2 Paige 99 it was held:—"The biddings at a "masters sale will not be open except *in very special* circumstance "and then it will not be done unless the purchaser is *fully and* "*liberally* indemnified for all damages, costs and expenses, to which "he has been subjected.

VI.

The decision of the Court below is reviewable on appeal.

In Tripp v. Cook 26 *Wend.* 150, speaking of this subject Senator Verplank, said: "That he could not consider this as a mere "question of practice. He deemed it a question involving a great "and important principle; and although the application made by "the appellant was addressed to the *discretion* of the chancellor "still it was of a character which might and should be reviewed. "The decision of the Chancellor granting a re-sale, although "resting in discretion, was reviewed here in *Collier v. Whipple*, "13 *Wend.* 224, and he perceived no reason why a decision re-"fusing a re sale, was not equally the subject of review, * * "Judicial discretion is a phrase of great latitude; but it never "means the arbitrary will of the judge. It is always (as Chief "Justice Marshal defined it,) a legal discretion to be exercised "in discerning *the course prescribed by law*; when that is discerned "*it is the duty of Courts to follow it. It is to be exercised, not "to give effect to the will of the Judge, but to that of the law.*"

See also Delaplaine v. Lawrence, 10 Paige, 602.
May et. al. v. May et. al., 11 Paige 201
Ryder v. Earl Gower, 6 Brown, Par. Cases, 306.
Bailey v. Maule, 7 Cl. and Fin. 121 note.
Ellicott v. Ellicott, 6 Gill and J. 35.

MATT. H. CARPENTER,

Counsel for Appellant.

1459

Supreme Court of the United States.

THE MILWAUKEE & CHICAGO R. R. CO.,
Respondent,

ads.

LEVI BLOSSOM, Appellant,

BRIEF FOR RESPONDENT.

JAMES S. BROWN and
JOHN W. CARY,
Counsel.

Starr & Son, Law Printers, Milwaukee.

1493

Supreme Court of the United States.

LEVI BLOSSOM Appellant,

vs.

THE MILWAUKEE & CHICAGO RAIL ROAD COMPANY.

STATEMENT AND BRIEF.

Bishop and Stewart as Trustees, and Schushardt and Gebhard et. al. as Creditors, filed their bill in the Court below to foreclose a mortgage given by the defendants upon their Railroad. On December 5th A. D. 1861, a decree of sale was entered. On June 2d, A. D. 1862, one C. H. Wheeler by Mr. Carpenter as his solicitor, and Messrs. Finches, Lynde and Miller as counsel, filed his petition in character of a stockholder to set aside the decree as a fraud upon the stockholders of said company. In said petition it is alleged, that said Levi Blossom was one of the firm of Bishop & Co., contractors with said defendant, that by the fraud of his co-partners, the firm became hopelessly bankrupt, and that while thus bankrupt, Blossom having abandoned all hope of

extricating himself from his difficulties, went to California, leaving his partners in possession of the assets of the firm, and of so much of the road as his firm had been constructing; (Pratt's record p. 32,) that the remaining parties fraudulently induced the directors of this company to declare their contract forfeited, and give them a new contract. Record p. 33.

The petition then in detail alleges the mortgage to be a fraud upon the stockholders; that the board of directors were tools of Bishop & Co. and by them were induced to give this mortgage without any real indebtedness on which to found it: it then prays that the decree might be set aside, and Wheeler be admitted to defend in the name of the Company. Record p. 43.

To this petition is attached a jurat of Levi Blossom, the appellant in this case, who now seeks to be declared a purchaser under this mortgage so fraudulent against stockholders. Record p. 46.

In opposition to this petition, several affidavits were filed, showing among other things, that Wheeler himself had been a director, and that it was upon his motion that several of the drafts referred to in the petition, were issued. Record p. 48.

It was further shown that the outstanding stock amounted to about a million dollars and that a plan of reorganization through the sale, by which the stockholders were to be protected was adopted at a meeting of the stockholders; (record p 48) a paper containing the plan of reorganization was also filed; (Record p. 49.) By this, it was agreed that certain persons named should appoint a suitable person to bid off the premises for the benefit of the creditors, and stockholders. At a meeting of creditors, bondholders and stockholders, a committee was appointed to make arrangements for re-organization. (Record p. 52.) On the 13th day June, 1862, the petition was denied. Record p. 53.

The first bid of Blossom ($250,000,) was on June 19th, 1862, and the second bid ($262,480.12,) was on June 21st, 1862. Record p. 58.

But it further appears by the affidavits of John W. Cary, attorney for complainants, that on the said 19th day of June aforesaid, the same day on which said first bid was made, Wheeler through his counsel, Messrs. Matt H. Carpenter and Finches, Lynde & Miller, filed a bill, (verified by the affidavit of Blossom,) alleging the mortgage to be a fraud upon the STOCKHOLDERS of the Company (defendant,) and procured an order of the District Judge, setting down an application to postpone the sale for

hearing, on the 21st day of June one hour before the time of sale; that the parties appear by counsel at the time fixed, and it was agreed without argument that the sale should be postponed. Record p. 59 and 60.

By reference to the report of the master, it appears that after the bid of $250,000 from Blossom on June 19th, without waiting to obtain higher bidders, and without striking off the property to Blossom, the marshal by direction of the *solicitor for the complainant*, postponed the sale until the 21st, announcing that the sale would be opened at the adjourned day with the bid of Blossom: on the 21st he again opened the sale merely for the purpose of adjourning as had been agreed, when Blossom interposed his new bid for the $262,480.12. And without any action upon the last bid, the sale was postponed by direction of the solictor for the complainant. Record p. 57 and 58.

Thus it appears that the marshal never closed the bidding or struck off the property, but by direction of the solicitor for the complainant, postponed the sale without ascertaining whether higher bidders might not appear; and that the second postponement was in compliance with an agreement with the solicitors for Blossom, then acting for Wheeler, but upon a bill sworn to by Blossom; that Blossom did not rely upon his first bid but made a second, when the premises were not in reality offered by the marshal for sale, but by understanding between all parties were to be withheld from bidding and sale; and that the marshal never acted upon the bid, but by direction of the complainants counsel at once adjourned the sale, without waiting to ascertain whether there might not be higher bidders.

The affidavit of Mr. Cary explains the first adjournment and also the motives of the complainants in assenting to proposition to postpone made by counsel acting for Wheeler and Blossom. One Mr. Price of Rahway New Jersey, acting as agent for the stockholders or claiming so to act, asked a postponement for the purpose of enabling them to make some arrangement, this was granted by the solicitors of the complainants, and before the adjourned day, a plan of adjustment had been agreed upon, and the solicitors for the complainant agreed that the sale should be postponed to a further day in pursuance of such agreement and in order to enable the stockholders to settle and pay off the decree. Accordingly on the adjourned day, Price relying upon the agreement was not present to bid, and the premises were not offered for sale (as stated by the marshal in his return,) but although Blossom in-

terp osed his bid, the sale was adjourned as had been agreed upon, first between the complainants and Price, and secondly between the complainant and counsel for Wheeler and Blossom, Messrs. Matt H. Carpenter and Finches, Lynde and Miller. Record p. 59 and 60.

To these statements contained in the affidavits in opposition to Wheeler and Blossom, there is no denial on record; if untrue, they were easily disproved; we therefore must take them as absolutely true.

As a resume of the facts already stated, and of the necessary inferences from them, we give the following statement of the case.

According to the statement of Wheeler verified by Blossom's affidavit, Bishop & Co., of which firm Blossom was a member, made a contract with the defendant, which in honor and law, they were bound to perform; the contract was honest and reasonable and unbroken on the part of the defendant; that Blossom being informed by his partner that the firm had met with certain losses, and finding himself entirely a bankrupt, instead of performing his duty towards the defendants, to whom he was so bound by contract, and instead of trying to force his partners into a performance of their duty, left for California, without an effort to save the defendants or even informing them of the difficulties before them; he left his partners and his creditors (the defendants,) to get along as best they might. In the meantime his partners by some means obtained a controlling influence over the board, and induced them in fraud of the defendants to surrender the old contract, and give a new and more advantageous one, but under circumstances so outrageously fraudulent, (if petition of Wheeler, verified by the oath of Blossom is to be believed,) as to make the act a nullity as against the defendants, and leave Blossom and his partners still legally as well as morally bound to the defendants to make good their original contract, and account for all intermediate receipts.

His partners however received from the defendants large sums of money to which they were not entitled, but not content with this, they induced the directors and officers of the company in fraud of the stockholders to make the mortgage under which Blossom now seeks to deprive the stockholders of their entire interest in the road: the mortgage was without the slightest consideration, and void as against the defendants who were to be defrauded.

These facts might be denied by the partners of Blossom, but having received the sanction of his oath, can hardly be denied by him.

His partners foreclose this void mortgage, and if we believe Blossom and Wheeler, by the same fraudulent appliances, obtain the decree.

As it appears however by other affidavits, the company embarrassed by its debts, harrassed by judgments, and overshadowed by mortgages, endeavor to compromise with its creditors, and it was agreed between creditors and stockholders, that this mortgage should be foreclosed for the purpose merely of re-organizing the company, making a certain class of creditors preferred stockholders, and leaving the stockholders still the owners of common stock unincumbered by debt; there was no design on the part of any persons interested either in the debts or the stock, that the road should be sold to strangers; it was merely a convenient mode of making the contract between creditors and stockholders effective, but it required in order to be effectually carried out the assent of all the stockholders.

It was at this stage of proceedings that Blossom re-appears from California, whether by his own story he had gone a fugitive from his liabilities to the defendants and a hopeless bankrupt, and he and his friend Wheeler, at once assail the mortgage and decree as fraudulent and void as against the defendants.

Wheeler the owner of two thousand dollars (20 shares) out of the million dollars of stock, appears as plaintiff, and Blossom does the swearing. We are not informed as to the motives, which induced Mr. Wheeler so to act : it is evident that it was NOT the value of his twenty shares, because the formidable array of distinguished counsel employed would make that but a small item towards their services. Nor would we readily believe that availing himself of his position as holder of 20 shares and knowing that the holders of the remainder of the million dollars in stock anxiously looked to the consummation of that arrangement as the means of preserving their stock, he adopted this method of compelling his associates in a common enterprise, to buy off his opposition at a price proportioned rather to their fears than to his interest.

Still less would we believe that the litigation as to the validity of the decree and mortgage, and as to the title to be acquired under them was with a view to frighten off purchasers, allay suspicions as to any intention on the part of Blossom to compete at the sales, and enable him to take unwary parties by surprise. As the proof shows Wheeler to have been one of that body of wicked directors, and to have himself moved

in the board the issuing of certain of the drafts (secured by the mortgage,) most strongly objected to in his petition as fraudulent, (record p. 48,) we would rather consider it an act of repentance, and a tardy though indiscreet effort to do justice to the injured defendants. To Mr. Blossom thus suddenly returned from his *hegira* to California, we would gladly ascribe the same motive; but we have not heard that out of those $262,480.12 which he brought back, he offered to pay any portion of his liabilities to the defendants or protect them against this mortgage so fraudulently obtained by his partners; and yet by his own story, to his breach of contract and that of his partners, all the embarrasment of the company are due.

This application to open the decree was refused, and the property was offered for sale on June 19th, but on that same day Wheeler filed a bill verified again by the affidavit of Blossom making all connected with the old suit parties, and seeking to set aside mortgage decree and all as a fraud; it is evident that this new bill then pending was a caveat to all bidders, and a notice that any title which they might acquire, would be the subject of future litigation. This new bill to prevent and set aside the sale was filed by the same attorneys; attorneys for Wheeler to prevent a fair sale, and for his friend Blossom to fasten on the company an unfair one.

Under these circumstances Blossom boldly bid $250,000, a sum less than the amount of the mortgage, and which destroyed $1,000,000 in stock. Mr. Price was there to bid on behalf of certain of the stockholders, the solicitors for the complainant to protect the mortgage, and see that the sale was fair.

But the position of Blossom was fortunate, if he should bid, his friend Wheeler could step aside and quietly allow him to keep the property, if the other should bid, they would only step into that litigation, which it was their object to avoid. If the sale had proceeded, it is evident that Price would have made a larger bid, however unwillingly, and that the solicitor for complainants would at least have bid the amount of the mortgage and costs, as was their duty in behalf of their clients. But upon application of Price they consented to a continuance to enable Price to pay the mortgage; the biddings were not conclued, the Marshal did not seek further or higher bidders, he did not determine that Blossom's was the highest offer, but without waiting for that, he adjourned the sale on direction of solicitors for complainants,

declaring that he should start the next bidding with the offer of Blossom.

On the morning of the adjourned day, the solicitors of Blossom and Wheeler were ready with a motion based on their bill, for a postponement of the sale, and upon appearing before the District Judge, it was conceded by the opposing solicitors without argument, and upon that understanding the motion was not taken up but the parties left the chambers of the Judge, this understanding must have been known as a fact to Blossom, and was known as a matter of law to him, because his solicitors were parties, to it; and the application itself was partly based upon his jurat. The sale was opened by the marshal for the mere purpose of declaring the postponement as agreed upon, but without inviting any bids, when Blossom interposed with a new bid of $262,480.12 thereby abandoning the old bid. But neither was his bid received by the marshal nor was higher bid invited nor would it have been received from any quarter, the marshal merely postponed the sale as agreed given no heed to the bidding.

It is to be remarked that the bids do not appear to have been reduced to writing as required by the practice of the English Courts of Chancery, or signed by the bidder, but were merely verbal offers, and that although Blossom's was the highest offer actually made, the marshal after such offer made no attempt to procure higher, and it is evident that but for the postponement higher offers would have been made; the property was never struck off to any one. The decree was after wards satisfied by the defendants, and the sale took place.

And we would call the attention of the Court to another ~~matter~~ fact; the affidavit of Blossom to the petition of Wheeler, shows that but a few years before the bid, Blossom left for California a bankrupt. We are not informed when and how he obtained the $262,480,12, but it is evident that neither the marshal or the Court have ever seen any of it: the petition states that one of his attorneys, Mr. Miller, did offer to comply with the bid, but does not pretend that any money was tendered, nor did Blossom ever bring the money into Court as the basis of his application to the Court below and of his appeal: the only security which we now have, that if his petition is here granted, he will pay the money, is the enormous disproportion between the bid and the value of the property he seeks to win.

By Blossom's own oath (record p. 34 fol. 55) the road had earned net for years before and over and above all expenses and outlays in money, which should go to the company, $150,000 per annum.

POINTS.

Levi Blossom made an offer of $262,420,12 for the railroad &c., of the defendants at a public auction; the biddings were never closed, and the marshal by direction of the solicitors for the complainant postponed the sale.

He now claims that without having advanced or tendered or paid into Court one cent in money, he has through his offer cut off one million dollars in stock, and acquired property which ought to bring the annual revenue of one hundred and fifty thousand dollars, and he asks the aid of a Court of Equity to enforce his claim.

POINT I.—The Courts of Equity watch the proceedings of their officers selling the estate of the mortgagor, with great jealousy. They require all to be fair, regular and legal, and even in cases where the sale is so conducted, will not allow a sacrifice of property, but will upon a proper showing direct a re-sale. By still stronger reason, they will refuse confirmation when the biddings were interrupted by the complainant or marshal, or when by trick or device of any party, a fair and full bidding did not occur.

We contend 1st, that there was no sale of the premises by the marshal: 2nd, that the sale was for so small a sum as compared with value that no court would confirm it; 3d, that the conduct of Blossom and Wheeler was fraudulent, and except by consent of all parties, a sale to one of them would not be confirmed.

We will present the case in the order above stated.

POINT II.—The practice of courts of the U. S. in cases of the foreclosure of a mortgage, where there is no rule of this Court is not governed by the practice of State Courts, but of that of the High Court of Chancery in England.

Rul 90 in Equity, R. of S. C. U. S.
Noonan vs. Lee, 2 Black U. S. R. 499.

POINT III.—By the practice in chancery in England the solicitors for the complainants conducted the sale and were bound to see that it

was just and fair towards all parties; the master in selling was under their control and all parties are bound by his acts.

2 Daniel Ch. Pr. p. 902

Dalby vs. Pullen, 1st Russ. and Myline p. 307.

The solicitors for the complainant in this cause at the first day of sale interfere before the biddings were completed, and directed a postponement of the sale, it being announced by the marshal that the bid of Blossom would be considered as starting the next biddings; at the adjourn day, the solicitors for the complainants agreed in the presence of the judge of the Court, and the solicitors for Wheeler and Blossom, and we may presume of the solicitors for the defendants, to postpone the sale; of course the defendants under those circumstances were quieted from appearing to protect their interest, all competition was prevented, and (by the official report of the marshal) the sale was opened merely to announce the adjournment. Here Blossom interposed a new bid, now the basis of his claim to the property, and without asking or allowing competition, the sale was again postponed, as agreed upon; the solicitors for the complainant having so ordered.

This was a direct use by the solicitors of the complainant of his power over the sale, to prevent further bids and all competition. Surely, this court will not hold the defendants bound by such proceedings.

POINT IV.—There was no legal sale.

The bid of Blossom was a mere offer, which he might withdraw at any time before the property was actually knocked off to him, and an entry to the effect made by the Morshal.

Crocker on Sheriffs, par. 473.

1st Henry Blackstone, 81.

1st Parsons on Contracts, 479-496-497.

Payne vs. Cann, 3 Term Rep. 148.

Fisher vs. Slitz, 23 Penn. State Rep. 308.

Rutlidge vs. Grant, 4 Bingham, 653.

POINT V.—The same principles which apply to other sales at auction, apply to judicial sales; the auctioneer or officer is agent for both parties, and it is his memorandum subscribed by him for both parties, which makes a contract.

Chitty on Contracts, p. 271.
Simons vs. Catlin, 3 Caine's Rep. 61.
Jackson vs. Catlin, 2 Johnson, 248.
Ennis vs. Waller, 3 Blackford, 472.
Robinson vs. McGrath, 6 Ala. 204.
Barnes vs. Patterson, 6 Harris & J. 182.
Christie vs. Sampson, 1 Rich. 407.
Elfie vs. Gadson, 2 do., 373.
Emmons vs. Ashley, 8 Mo. 177.
Alexander vs. Merry, 9 do. 514.

Therefore Blossom, having merely made a verbal offer, had acquired no rights.

POINT VI.—It was the duty of the Marshal to obtain the highest price: he should hold the sale open until it is evident that no higher price can be obtained, and then exercising a sound discretion, he may strike it off; it is a sale only from the time it is so struck off, and the memorandum made and signed by the Marshal.

In no other way can the defendants be deprived of their property. If the Marshal and complainant improperly adjourn a sale, or interfere with bidders, that might estop them, or give some right to the bidder as against them; but the defendants can be affected only by a full and fair sale.

But here there is no pretence that the Marshal determined that further and higher bids could not be obtained; on the contrary, it is evident that had not the sale been postponed, higher bids would have been received. He adjourned the sale, not because he could not then get higher bids, but because he was so directed.

POINT VII.—The decree itself (Record p. 28) gives the defendant the right to pay off the mortgage at any time before the sale—not before the *day* of sale, or the *hour* of sale, or before the first bid, but before the sale itself. But when has a sale taken place? It is when the biddings are completed as required by the rules and practice of the Court; when the marshal has ascertained by actual experiment (crying the property, and awaiting a reasonable time) that higher bids than those already made cannot be obtained; and has by public declaration so determined,

that the sale has taken place. Up to that time the right of payment by the terms of the decree belongs to the defendant. The object of Courts of Chancery is not to punish the mortgagor or sell his property, but to protect the ultimate rights of the mortgagee, therefore it will allow the defendant every indulgence consistent with those rights. But it is apparent that the biddings were not completed when the defendant exercised this right of payment, and saved the estate. It is not for third persons to ask *how* the payment was made; it is enough that the mortgagee was satisfied.

POINT VIII.—And the officer is bound to protect the property against sacrifice even at law, and may postpone the sale in his discretion after bids.

Tinkham vs. Purdy 5 John R. 345.
Keightly vs. Birch 3 Campbell 321.
Leader vs. Denney 1st Bos and Pull 359.

POINT IX.—If the practice of English Courts of Chancery is to govern, then no bid was ever made.

In England, the officer has a book in which each person writes out his proposition and signs it. No other form of bids is considered; here there was no written offer, and no memorandum made by the Marshal, or signed by them.

3 Daniel, Ch. Practice, p. 906.
1st Sug. V. & P., p. 56.

And even after the biddings are closed and the purchase money paid, the bidder in England acquires no interest in the land until after confirmation.

3 Daniel, Ch. Pr. 909.

And if the premises are destroyed by fire, the bidder is not bound by his bid.

3 Daniel, Ch. Pr. 910.
1st Sug. Vend. & Purch, 60.
Exparte Minor, 11 Vesey, 559.
13 Vesey, 518.

POINT X.—The Court will not allow the property of the defendants to be sacrificed, but will, upon a mere advance of price, set aside bid-

dings. In one case Lord Lyndhurst set aside a bid of £12,010 on an offer of £500 more.

3 Daniel, Ch. p. 923.
LeFroy vs. LeFroy, 2 Russ. 606.
Brooks vs. Smith, 3 V. & P., 144.
Tait vs. Lord Northwick, 5 Vesey, 655.

The only proof of value in this case is in the fact that there are a million dollars in stock, which, without any compensation, would be cut off, and the petition of Wheeler, verified by the affidavit of Blossom, showing that they had (in the absence of the fraudulent misapplications of Blossom's partner,) produced the net income of $150,000 per annum. This is an evident attempt to obtain a vast amount of property for a trifle. The second bid which Blossom wishes the Court to confirm, is, for causes we shall point out to the Court, a nullity; but it shows that Blossom himself would and did offer more than his first bid, and the defendant, in paying off mortgage and costs, paid more.

POINT XI.—The report of the marshal must be taken as verity in this case; and he says that the sale was open on the 21st for the purpose of the postponement merely. No bids were invited and none received. Record, p. 58. The bid of the 19th was the only one which ought to be called even a bid, but that was waived by the offer of the larger sum on the 21st.

The decree made even a sale, whose terms were not fully complied with within two days from the sale, void. Record, p. 29.

There is no pretence that Blossom even complied with or offered to comply with the first bid. Therefore, by the terms of the decree, he has no rights.

POINT XII.—The petition of Blossom, appealed to this Court is, that the property be adjudged to him on complying with the bid of the 21st, and that the marshal be directed to *strike* off the property to Blossom, and certify the facts &c. Upon this we remark:

1st. That Blossom has asked confirmation of his last bid and no other, and must therefore succeed on that or not at all.

2d. That he does not allege that he complied with his bid, or that he actually tendered the money to the marshal, but simply that he offered through Mr. Miller so to do, and the marshal waived a tender.

But, the decree made every *sale* VOID, which was not complied with in two days. The rights of the plaintiff and defendant were fixed by the decree, and the property of the defendant could be forfeited only by its terms. The marshal was not the agent of the defendant, and could not waive a compliance with the decree on the bid. That the marshal told the agent of Blossom that he need not comply or make a tender, did not set aside the positive terms of the decree requiring compliance within two days, or making the sale void.

POINT XIII.—The confirmation must be made on the report of facts by the officer; that can be the only basis upon which the Court can make the final order. By the English practice the purchaser procures a report of the master, and then moves to confirm on that report.

3 Daniel Ch. Pr. p. 909.

So much of the petition as asks a confirmation should therefore be rejected, as it can only take place after the Court is informed by its own officer.

The petition was filed on July 9, 1862; the marshal's report on January 6, 1863.

If that report was false, or did not contain all the necessary facts to make out Blossoms case, he should have applied to the court to compel the marshal to make further report. But no such thing has been done, nor is there any allegation that the report is wrong. But by the report it does not appear that Blossom ever even *proposed* to the marshal to comply with his bid. Record p. 29. Consequently Blossom, by the terms of the decree, had no rights as two days had elapsed without compliance with his bid.

POINT XIV.—The appellant will (we understand) endeavor to save himself from the authorities on the subject of auction sale, by insisting that in England sales are not at public auction, and that the rights of the parties are not governed or controlled by such sales.

It is hardly necessary then to discuss the general principles, as the decree itself expressly declares that the sale shall be at public auction. As well those who bid, as those who wishing and intending to bid, waited for a proper time, were governed by the known law of public auctions. Record p. 28, fol. 45.

POINT XV.—The purchaser should have paid or tendered money, or he has no rights.

This case, 1 Wallace 655.
Decree Record p. 29.

No money has been tendered or paid into Court, although Blossom swore that he went some time ago to California—a bankrupt—from his ltabilities to the defendant, and, although it does not appear that, his liabilities have ever been discharged.

POINT XVI.—Blossom has fraudulently attempted to prevent a sale at full price. His friend Wheeler and himself have evidently connived together—Wheeler appearing to show that there could be no sale, filing a bill to impeach its decree as a fraud upon the defendants; Blossom swearing to the facts, and after through their joint efforts, the solicitors of the complainant had agreed to a postponement of the sale; Blossom making his fraudulent bid, although the sale was open not for bids, but to carry out the arrangement to postpone.

Wheeler's petition Record p. 30.
Blossom's affidavit to petition, Record p. 46.
Bill by Wheeler, jurat by Blossom, agreement to postpone, &c., see affidavit, of Cary, Record p. 59.
Sale opened merely to postpone, Record p. 58.
Blossom appears by same attorney, Record p. 56.

For the particular facts, on which this charge is founded, we refer the Court to our *resume* of the facts in a former part of this brief.

POINT XVII.—There was a direct agreement between all the parties in interest, made in the presence of the Court, that there should be no sale on the 21st, but the same should be postponed. Even had the marshal, with the consent of the complainants, gone through the regular forms of sale, no Court would allow such a sale to stand as against a party in interest, thrown off his guard by such an arrangement.

And as a further reason why Blossom must rely upon his bid of the 21st alone, his jurat attached to a bill filed after the first bid, and seeking to set aside the whole proceeding as a fraud, was such an interference as would estop him from claiming a title up to that time under the decree.

The two counsel in this case separately prepare a brief, with a view of afterwards comparing and reducing them into one; Mr. Cary, being ready to leave for the East, gave his brief to Mr. Brown for that purpose; but the latter had not then time to combine the briefs, without doing injustice to Mr. Cary's points, and greatly weakening the force with which they present the case.

He therefore begs the indulgence of the Court for presenting them as written by Mr. Cary.

The order of the Court below should be affirmed.

I.

There was no sale by the marshal. The premises were offered for sale and some bids made, but no bid was accepted. No bargain was closed or consummated. A bid, until accepted, is a mere proposition to purchase, and is not binding upon the bidder until accepted, and at any time after making it, before acceptance, the bidder is at liberty to withdraw his bid. In all public sales or sales at auction, the sale is consummated by the fall of the hammer—by striking off, or by the words "going, going, gone," or "sold," or equivalent expressions, showing that the auctioneer accepts some bid that has been made. From that time the bidder is holden, and is not at liberty to be off. But until that time his bid is but a proposition, which he is at perfect liberty to withdraw.

This manner of closing a sale in Chancery is just as necessary as in any other auction sale, and until so closed there is no sale. The appellant in this very case prays that the "marshal may be ordered to strike off the property to him." Thus admitting that the sale was not consummated; that his bid was not accepted, and that such ceremony was necessary to perfect it. A mere bidder, whose bid is not accepted, does not become a party to the record, and has no right to appeal. When a bid is accepted and the property struck off, and so reported by the mas-

ter, such purchaser becomes *quoad hoc* a party to the record, but not otherwise. The appellant, therefore, is not a party to the record, and has no right of appeal.

II.

The theory of the appellant deprives the complainant of all control over the sale on his decree. Whenever property is once offered, the sale must be consummated, no matter what occurs; if there is a bid, all power is withdrawn from the complainant or his solicitor to withdraw the property from sale. Want of bidders—the certainty that the property would be sacrificed for a tenth part of its value, or even as in this case, although the bidder had conspired and connived, with others, to get up some sham legal proceedings to attempt to restrain the sale, and actually obtained an understanding that the sale was not to take place, and thus disposed of all other bidders and then surreptitiously thrusts his bid upon the marshal, the complainant and his solicitor are powerless to prevent the sacrifice.

We deny that any such principle governs Equity practice, but on the contrary, such sales are under the direction of the complainant's solicitor; and if in the fair exercise of his duties, he deems it advisable for any good cause to withdraw property offered for sale, he has the power, and it is his right and duty so to do; and such is the daily practice.

That a defendant cannot at any time before a sale of his property is actually consummated, prevent such a sale by the payment of the judgment or decree, is a doctrine too monstrous to be entertained for a moment. It is not the doctrine of our Courts of Chancery, but of Shylock.

III.

But admitting that a sale can be consummated by making a bid, without its being accepted, and that the complainant or his solicitors has no control over the proceedings at the sale, as claimed by the appellant, still common honesty requires that the proceedings should be fairly conducted, and that there shall be no trick or device to deter bidders or prevent fair competition, and any misunderstanding or mistake which has that effect, is sufficient to justify the Court in refusing to confirm the sale.

Now in this case the appellant relies upon his bid made on the 21st, and asks to have the sale confirmed to him on that bid.

Before that pretended bid was made, Blossom and his friend and counsel had prosecuted a suit to restrain said sale. The complainants had consented to an adjournment for three months, and in consequence thereof the order to show cause was not heard. The marshal was directed so to adjourn said sale, and, as he states, opened it, or, in other words, resumed it for that purpose. No bidders were in attendance, all relying upon the arrangement for the adjournment, when the appellant attempts to thrust his bid upon the marshal. And upon such a bid, and under such circumstances, he came before the Court below asking to have the proceeding declared a sale, and that it should be confirmed—which was refused. Was this a fair sale? Would it have been just to the parties interested? Would it have been dealing honestly and fairly by this railroad company and its stockholders? And had the District Court made the order asked for, would not this Court, on appeal, have reversed it as grossly unjust, outrageous, and inequitable?

If this was a sale, it had none of the characteristics of a fair and just sale of the property. The bidders were all led to believe it was not to take place. The parties in interest were not present so as to protect their rights, and if now adjudged to be a fair and valid sale, property to the extent of over a million of dollars would be sacrificed. Such a sale was never sanctioned by a Court of Equity, and this proceeding cannot be adjudged a fair and valid sale, except by ignoring every principle heretofore held essential to fair dealing.

IV.

A marshal's sale on foreclosure must have a valid subsisting decree to authorize it. The proceeding which the appellant, by his petition, seeks to have consummated and declared a sale, is only inchoate. It must be completed before it can have the force of a sale. It asks "to have the marshal directed to strike off the premises to the appellant, and to certify that fact to the court, and that thereupon the sale may be consummated." See Record pp. 55 and 56. The petition therefore admits that no sale has yet taken place, but desires the Court to take the necessary steps to make a sale. But there is now no decree of foreclosure. That has been satisfied of record. The debt secured by the mortgage, and to enforce which the decree was entered, has been fully paid by the defendant, the railroad company; which payment cancelled the decree, and took away

all the right and authority which the marshal or the Court had to sell said mortgaged premises.

It was competent for the mortgagor to pay the debt, and save the property from being sold at any time before a sale *actually took place.* Payment may be made at any time before a sale is actually consummated; at any time before the hammer falls, if the property has not been *struck* off, payment is in time to save the property and prevent the sale.

In the case at bar, the appellant admits the sale never has been consummated; that it has not been struck off, and now asks that it may be done. But the debt having been fully paid, and the decree cancelled and discharged, there is no power, authority or warrant left to the marshal to consummate the sale by striking off the mortgaged premises. His authority is cancelled, the decree is *functus officio*, and the Court have no power to revive it. There is no longer any debt due the complainants. They have no mortgage, and no sale of the property has ever been made and consummated. What power or authority is there now in the Court or marshal to make the sale? Their power and control over the mortgaged premises are at an end.

The counsel says the marshal *ought* to have made the sale, and *ought* to have struck of the mortgaged premises to the appellant; granted, for the sake of the argument, that he ought to have done so; yet he did not do it, and before it is done the debt is paid, the decree satisfied and cancelled, and all power and authority, either in the marshal or Court, over the premises in question is at an end. Hence it is now impossible to grant the prayer of the appellant's petition to direct the marshal to *strike off* said premises to him, and consummate said sale.

V.

The brief of appellants' counsel (page 3,) states that "By appearing "at the sale and bidding for the property, Blossom submitted himself "to the jurisdiction of the Court, so that it could compel him to per- "form his bid, &c."

We deny this proposition, as stated. By appearing and bidding, he simply made a proposition, which, if accepted, would bind him to its performance; but until accepted, and the sale consummated, by striking off the property on that bid, he was not bound, and he was at liberty to withdraw his bid at any time he chose before such acceptance.

2d—On page 4 of his brief, he says: "From the authority above

cited, it clearly results that the marshal's striking off the property is wholly unnecessary, &c.

Here, again, we differ *in toto* with the counsel. The authorities show no such thing, but on the contrary, the American practice of judicial sales is to sell at auction, and in all cases the officer making the sale designates the purchaser by accepting his bid, and formally *striking off* the property to him, in presence of the spectators. Until such striking off occurs, the sale is not consummated, and up to that time, the bidder is at perfect liberty to be off, or withdraw his bid; but after that, is bound by it.

Again, the officer does in all cases report that he has *sold* the property, naming the person purchasing; also, stating the amount for which the sale was made, and that it was the highest and best bid. It is true that all such sales are within the power of the Court, either to confirm or to set aside. But the Court never confirms or sets aside a sale until it has been made and reported by its officer; and we venture the assertion that the case at bar is the first instance of an attempt in this country to have an unaccepted bid at a judicial sale declared a valid and binding sale, and confirmed as such. Under our practice, there is no difference whether the sale is on execution, or under a decree, so far as striking off the property to the highest bidder is concerned, in order to consummate a sale. The only difference is, that in our case the sale is subject to the power of the Court either to confirm or set aside. Under the New York Chancery practice, the deed is always given to the purchaser by the officer making the sale, at the time of the sale, without waiting for confirmation by the Court.

We are aware that the English practice is somewhat different, but their practice in this respect is not in force in this country.

3d—It is not pretended that the complainant's solicitor can absolutely control the marshal in making the sale, but it is claimed that the sale should be made under the direction of such solicitor, and such is the uniform practice.

4th—The citation from Hoffman's master in chancery, on page five of the counsel's brief, has no authority to support it. No case is cited by Mr. Hoffman to support the opinion expressed by him, and it is evident that the statement as then made, and without qualifications, is not the law of the land.

The case of Mott vs. Malkby 3 Edwards 590 is not cited by Hoffman

in support of the text quoted by the counsel, and does not support any such doctrine, but shows that a Court of Chancery will lean very strongly against the sacrifice of property at judicial sales by sharp practice, or an adherence to technical quibbles, whereby attempts are sometimes made, as in this case, to sacrifice the real interests of the parties interested.

JAMES S. BROWN,
JOHN W. CARY,
Of Counsel for Respondent.

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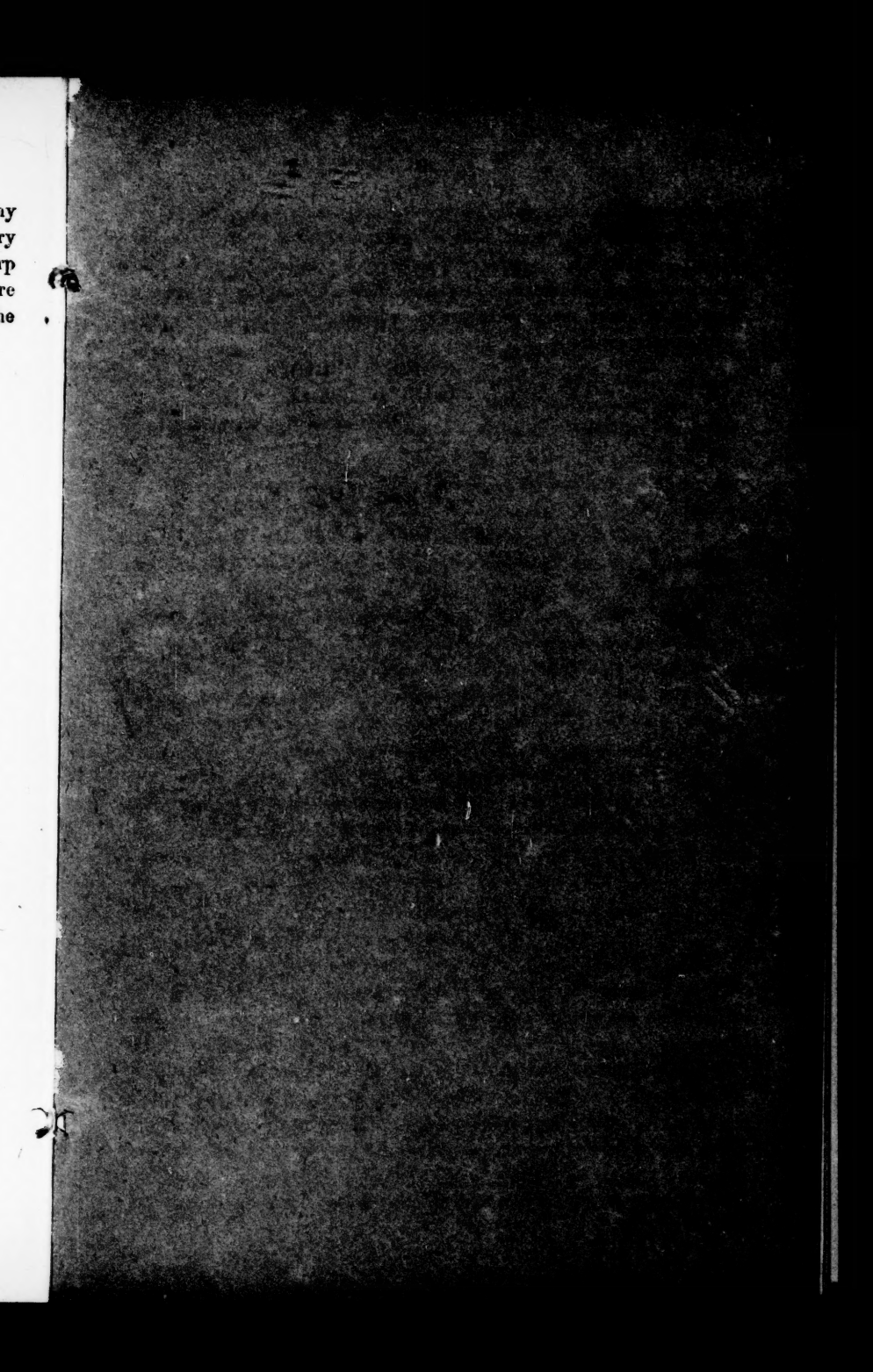

Supreme Court of the United States.

DECEMBER TERM, 1864.

MARINUS W. GARDINER, CITY TREASURER OF THE CITY OF PROVIDENCE, PLAINTIFF IN ERROR,

vs.

ANNA R. BABCOCK, BY HER NEXT FRIEND, SIMEON R. BABCOCK.

This action was brought in the court below against the City of Providence, to recover damages sustained by the plaintiff by reason of a sidewalk in one of the public highways of said city being out of repair, and unsafe.

The sidewalk is in the very centre of the city, and very much used by foot passengers, and is within fifty or sixty feet of the great bridge over Providence river, by which the population on either side of the river pass to the other.

The plaintiff's injuries were occasioned by falling through a hole or opening extending into the sidewalk some fifteen and a half inches from the side of the brick building standing on the southerly line of the sidewalk and about four feet long. A cover was arranged over this hole, which was raised or shut down by means of hinges near the side of the building, and which, when raised, left an opening to the cellar of twelve to sixteen inches in width outside of the curbstone. There were no steps below

the cover, but a clear space or fall of seven feet or more to the bottom of the pit.

The day of the accident was Commencement Day at Brown University, and at the time of the accident a public procession was passing within a short distance (a few feet) of the place of the accident, and a large number of people were then passing on foot through this street.

The offices of the mayor of the city and other city officers then were and ever had been in the building on this street directly opposite to the place of the accident.

The street in question has a sidewalk proper, only on the side where the injury was received.

I. It is made the duty of towns and cities in Rhode Island to keep their highways *safe* and *convenient* for travelers at all seasons of the year.

Section 1, page 122, of the Revised Statutes of Rhode Island is as follows:—"All highways, town ways and causeways, and all bridges excepting only those referred to in the 25th section of this chapter, lying and being within the bounds of any town, shall be kept in repair and amended, from time to time, so that the same may be *safe* and *convenient* for travelers, with their teams, carts and carriages at all seasons of the year, at the proper charge and expense of such town," &c.

Section 13 imposes a fine upon any town which shall neglect to keep in good repair its highways, &c.

Section 14. "Such town shall also be liable to all persons who may, in any wise, suffer injury to their persons or property by reason of any such neglect," and gives a remedy for such injury.

The same statute gives the towns ample power to enable them to discharge the duty imposed on them.

This statutory duty and liability applies to sidewalks, when

they are within the limits of a public highway, with as much force as to the other portions of the highway.

This statute has been so construed by this court.
The City of Providence *v.* Clapp, 17 How. 161.
As have similar statutes in other States.
Bacon *v.* City of Boston, 3 Cush. 174.
Chicago City *v.* Robbins, 2 Black. 418.
Wallace *v.* City of New York, 2 Hilton, 440.
Congreve et al. *v.* Smith, 18 N. Y. 79.

The duty of the city to keep its sidewalks safe and convenient for foot passengers is quite as imperative as is its duty to keep other portions of the highway safe and convenient for those who travel otherwise.

SAFE and CONVENIENT then is the statute standard for highways and sidewalks in Rhode Island.

II. This duty of keeping highways and sidewalks safe and convenient requires different degrees of care and vigilance on the part of towns and cities, varying according to the locality and amount of travel. A highway in a sparsely settled country town requiring less care than an avenue leading into a city, and either much less than the streets and sidewalks of a city.
Fitz *v.* City of Boston, 4 Cush. 365–8.

Pedestrians upon the sidewalks of cities often have their attention fully occupied in threading their way through, and avoiding collision with, the crowd, without being obliged to look out for pitfalls and stumbling blocks.

And especially is this the case on holidays and public occasions like that when this accident occurred. On such occasions, it is almost impossible for a person to see the place where his foot is to fall before it is down, and the weight of his body is thrown upon it.

The degree of care required of towns, in relation to highways and streets, increases in proportion to the nature of the use, and the amount and kinds of travel upon them. "The nature and extent of the repairs must necessarily depend on their location and uses; those thronged with travelers may require much greater attention than others less frequented."

The City of Providence *v.* Clapp, 17 How. 170.

III. But wherever the highway or sidewalk is located, and however used, the duty of the town or city remains imperative to keep it safe and convenient for *its* use.

Travelers, in order to be entitled to recover damages of a town, are not bound to look far ahead in order to guard against obstructions which ought not to be suffered to exist.

Thompson *v.* Bridgwater, 7 Pick. 189.

In City of Providence *v.* Clapp, 17 How. 170, the court say: "The just rule of responsibility, and the one, we think, prescribed by the statute, whether the obstruction be by snow or by any other material, is the removal or abatement so as to render the highway, street or sidewalk at all times safe and convenient, regard being had to its locality and uses."

The people of a city and travelers in passing to and from railway stations and steamboat landings, and for other purposes, have occasion to move and drive rapidly, and while greater care is required of them to avoid collision with others using the streets in like manner, they have the right to presume that the path before them is free from all other dangers,—that it is safe and convenient.

Pedestrians have the right to converse with each other and to accost those they meet; to look about and observe persons and things. Women and children have the right to look into shop windows, and at each other's bonnets and dresses. Foot passen-

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gers upon the sidewalks of a city are not bound to keep their eyes directed to the pace or three feet of earth next before their toes. In short, they know that it is the duty of the city to keep its sidewalks safe and convenient, and *they have the right to presume that the city has performed its duty.*

IV. This duty and liability of the town or city, (provided it has notice thereof,) is not affected by the manner in which the defect occurs, nor by the cause from which the unsafeness arises.

Notice to the town of the defect or unsafeness may be proved in different ways,—by direct, or by inferential evidence.

In Lobdel *v.* New Bedford, 1 Mass. 153, the court say:—"But open and visible defects, and such as could be prevented by common and ordinary diligence, towns are, by law, bound to take notice of and guard against."

In Reed *v.* Northfield, 13 Pick. 94, Shaw, C. J., "We are also of opinion that notice to the town of the dilapidation of the highway and bridge complained of was rightly left to the jury. It has often been held, in giving a construction of this act, that notice to the town of the defect in the highway may be inferred from its notoriety, and *from its continuance for such a length of time* as to lead to the presumption that the proper officers of the town did, in fact, know, or with proper vigilance and care might have known, the fact. The latter is sufficient, because this degree of care and vigilance they are bound to exercise, and therefore, if in point of fact they do not know of such defect, when by ordinary and due diligence and care they would have known it, they must be responsible as if they had actual notice." To the same effect is Howe *v.* Plainfield, 41 N. H. 135.

While towns and cities do not guarantee that accidents and injuries shall not occur, yet, having notice, they are liable for all injuries which any person, exercising ordinary care, sustains by reason of any highway not being safe and convenient.

Ordinary care is defined to be, not such care as *prudent* persons generally exercise, but "such care as persons of *common* prudence generally exercise."

Farron *v.* Greene, 32 Me. 574.

Highways are for the use of all,—old and young; children and youth; for the intelligent and ignorant; the careful and careless; thoughtful and thoughtless; and "at all seasons" and times.

It is the *common prudence of all such* that the law has reference to, and all such it protects. Children of ten or twelve years of age and upwards have the right to pass upon the sidewalks of our cities, to and from school, &c., without a guard. And if they have the *common* prudence of *children*, the highway must be safe and convenient for *them* to pass and repass upon, with ordinary care.

The following cases illustrate the application of the rule of duty and liability of towns to different kinds of defects and unsafeness:—

In Harwood *v.* City of Lowell, 4 Cush. 307, 310, where the line of the highway was not indicated by any visible object, and there was a post near its line and within the limits of the general course of travel, the court said, towns are bound to keep the roads within their bounds safe for travelers; and under the circumstances of this case, it was no less the duty of the defendants to guard travelers from injury by the post on the roadside, than to guard them from falling over precipices, or into pits near the line of the road, or from being thrown into the water from a bridge.

In Alger *v.* City of Lowell, 3 Allen, 402, the defendant was held liable for want of a railing to protect travelers from going down a declivity just outside the line of the street, and this, although the injury was not received by passing down the declivity directly from the street itself, but by passing from the street on to a strip of land outside of the street and thence into a hole.

In the same case it was held that the city had a right to build a fence or railing across such a place.

The want of a safeguard against a danger *near* the highway is a defect *in* the highway.

Willey *v.* Portsmouth, 35 N. H. 303.

In the following cases the injuries were occasioned by something outside of, or from the want of a proper safeguard against something outside of, the traveled way, and the towns were held liable on the ground that such were defects *in* the highway.

Jones *v.* Waltham, 4 Cush. 299.

Hayden *v.* Attleboro, 7 Gray, 338.

Davis *v.* Hill, 41 N. H. 329.

Where a city caused excavations in the street, and did it by contract, and neglected to put up lights or any guards or barriers, held liable for injury sustained.

Storrs *v.* City of Utica, 3 Smith (N. Y.), 104.

It is the duty of towns to put up railings and lights when repairing highways.

38 Me. 219.

It is the duty of towns to provide reasonable security in reference to such accidents *as may be expected* to occur.

Kelsey *v.* Glover, 15 Vt. 716.

In —— *v.* ————, 6 Shepley, 286–7, the horse which the plaintiff was driving was frightened, kicked, and got out one side of the road and drew the carriage against a log, whence the injury. The court said it had no business there. It is *to be expected* that horses will be frightened.

In Coggeshall *v.* Lexington, 4 Cush. 387, Dewey, J., says: "The general rule is, that if there are dangerous pits, excavations or precipices without the limits of the located highway, but

so near it that they would, without railings or guards, endanger the safety of passengers using the traveled part of the road with ordinary care and diligence to avoid exposure, it was the duty of the town to guard such pits, &c., by railings, and if neglected, the town would be liable for the injury thereby occasioned."

Phillips *v.* Veasie, 40 Me. 96.
Elliott *v.* Concord, 7 Foster (N. H.), 204.
Batty *v.* Duxbury, 24 Vt. 155.
Willey *v.* Portsmouth, 35 N. H. 313.

Are all cases where railroads were built across highways, and injuries sustained thereby. And in all of them the towns were held liable.

In Hall *v.* Manchester, 40 N. H. 410, the plaintiff sustained injury by a fall on a sidewalk occasioned by cutting a ditch in the ice thereon to turn the water into a side gutter, and the city was held liable.

In Daggert *v.* Schenk, 23 Wend. 446, a case where the defendant cut a raceway across the highway, Cowen, J., says:— "Any act of an individual done to a highway, though performed on his own soil, if it detract from the safety of travelers, is a nuisance,"—citing Hart *v.* Mayor of Albany, 9 Wend. 607. A ditch dug in a public highway was specifically pronounced to be such by Savage, C. J., in Harlow *v.* Harrison, 6 Cowen, 101; and Sutherland, J., in Lansing *v.* Smith, 8 Cowen, 152, says, "*The utmost care to prevent mischief will not protect him*" (defendant) "*if the injury happens without gross carelessness on the side of the sufferer.*"

"The moment a plank became *liable* to slide from the bridge, or any other serious difference arose against its safety as compared with the original unbroken ground, the ditch took the character of a nuisance." "The difficulty lies in the bridge being dangerous, a thing clearly inconsistent with the public use, *unless kept perfectly safe.*"

In Congreve et al. *v.* Smith, 18 N. Y. 79, where the plaintiff sustained injury by the breaking through of a flagstone forming part of a sidewalk and falling into an area beneath, the court say: "It certainly is just that persons who, without special authority, make or contrive a covered excavation in a public street or highway for a private purpose should be responsible for all injuries to individuals resulting from the street or highway being thereby *less safe* for its appropriate use, there being no negligence by the party injured, and I entertain no doubt that a liability to that extent is imposed on them by law." This case affirms the before case cited in 23 Wend.

So, in Congreve *v.* Morgan & Smith, 18 N. Y. 84, the court say: "The liability of the defendants does not depend upon their negligence either in providing an unsuitable stone, or in continuing the use of it after it had become unsuitable, from any cause, *but from the fact that the stone was unsafe at the time the injury occurred, and occasioned the injury.*" "*They*" (the defendants) "*were bound, at their peril, to keep the area covered in such manner that it would be as safe as if the area had not been built. This measure of liability is essential to the public interests and the protection of the rights of individuals.*"

Where a city is building a sewer in its streets, (although by special contract,) it is liable for an injury occasioned by its neglect to maintain lights and guards around the excavation made in progress of the work.

Storrs *v.* City of Utica, 17 New York, 104.
Hitchcock *v.* Village of Plattsburg, 16 N. Y. 161.
The City of Buffalo *v.* Holloway, 3 Seld. 493.

Where the injury arose from the elevation of one edge of a plank which was laid over an open space left for the passage of water in a public street.

The court instructed the jury, "that if the plank was split and loose, and *liable* to change, and unsafe for twenty-four hours before the accident and continued so until the time of the acci-

dent, or if the city authorities had reasonable notice that it was unsafe, the defendants would be liable although the position of the plank which was the immediate cause of the accident had not continued an hour." This instruction was sustained after exception.

Winn *v.* City of Lowell, 1 Allen, 177.
The Mayor of Baltimore *v.* Pennington, 15 Md. 12.
Chicago City *v.* Robbins, 2 Black. 418.

The case of City of Providence *v.* Clapp, 17 How. 161, covers this case entirely. It only requires that "hole in the sidewalk" be inserted and read in the stead of "ice upon the sidewalk."

In Bacon *v.* City of Boston, 3 Cush. 174, the plaintiff received injury by stepping into an opening in the sidewalk, thirty-seven inches long, and extending into the sidewalk fourteen inches in width. The street was laid out in 1842, and the aperture in question was made at that time, and continued unchanged to the time of the accident.

The defendants offered evidence to show that there were the following apertures in sidewalks in Boston: cellar doors which were open, 399; passage ways extending into the street more than six inches, 512; cellar windows extending into the street more than six inches, 604. And the counsel for the defendants contended that the jury had the right to infer from there being such a number, and so long continued, that they were not actionable obstructions.

The court say: "The law is clear. The liability for injuries occasioned by defects in the public streets attaches to the city, and this liability extends to the sidewalks when they constitute a part of the public streets. As such they are to be kept in a *safe* and *convenient* state of repair for public use. It does not vary the principle or discharge the liability, that individuals as owners of the fee are permitted to use the premises above or below the easement, for private purposes not inconsistent with the rights of the public."

"What will constitute obstructions rendering a public way

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In proof of this point I refer to the concluding paragraph of the brief of counsel for plaintiff in error—page 4 of his brief. It is the equivalent of his three propositions. It is equivalent to a request to the court to charge in *its* language. Nothing could be more indefinite.

The cases cited by the plaintiff in error from 21 Pick. and 1 Cush. relate to the construction of deeds and *private ways* and *not highways*, and have no application to this case.

There was no necessity for this opening in the sidewalk. The uses of the building could have been just as well subserved by a scuttle inside the building as in the sidewalk outside of the building. It is not like the case of erecting or repairing a building—building a drain or the like.

Whatever use an adjoining owner makes of a highway must always be subject to the paramount right of the public to have it safe and convenient.

And this is for the jury. Cases cited fully cover this. The liability of the city does not depend on notice of each time hole is uncovered.—1 Allen, 177, and cases cited.

unsafe and inconvenient for the traveler must depend, in a great degree, upon the locality of the road. In the present case, the entire sidewalk was only six and a half feet in width. *A sidewalk of this width, in the city of Boston, should be, for its whole extent, so constructed and fitted for use as to be safe for all persons passing over it.*"

The two cases last cited conclude the case now before the court.

V. It is the province of the jury to determine upon the evidence whether the highway or sidewalk in question is safe and convenient or not.

Hilton *v.* City of Boston, 4 Cush. 365.
Clark *v.* Fry, 8 Ohio, 358, see 375.
Hall *v.* Manchester, 40 N. H. 410.
Bacon *v.* City of Boston, 3 Cush. 174.

In The City of Providence *v.* Clapp, 17 How. 161, 166, the court below charged, "that it was for the jury to find as matter of fact whether the sidewalk, at the time in question, was in a reasonably safe and convenient state, having reference to its uses," and this court affirmed that charge.

Wightman *v.* Corporation of Washington, 1 Black. 39, (see 49,) is decisive on this point.

VI. There was no error in the charge of the court as given, nor in the refusal to charge as requested by the counsel for the defendant.

The propositions in the charge given, are so definite and so well settled by repeated decisions that discussion of them would be superfluous.

The refusal to charge as requested by the defendant, we will consider.

1. The request of the defendant to charge, and which was

refused, states that the defendant offered evidence *tending* to prove divers matters of fact as to the size of the opening, how covered, how long it had existed, and its use, &c., and then proceeds to ask the court to charge the jury unqualifiedly and peremptorily as to these matters as though they were *agreed* or *admitted facts*. He assumes to have matters of fact disposed of by the court under the form of a charge as to matters of law.

Where there is any conflicting evidence as to matters of fact the court cannot withdraw these from the jury. And in such cases, where the rights of parties turn upon the finding of the jury upon such evidence, the *farthest* the court can go, is to charge that *if* the jury find certain facts, then the rule of law is thus and so. To go further is error.

2. The request taken in connection with the preamble on which it purports to be based, is indefinite and ambiguous, and could only tend to confuse and mislead the jury.

The preamble states that the defendant offered evidence *tending* to prove that the defect in question was an opening in the sidewalk, stating its dimensions, how covered, &c., "that the cellar-way had been used by the occupants of the store for more than forty years for the purpose of taking in and putting out merchandise *in the course of their business, being opened for that purpose as required during the periods of actual use*," &c., and then asks the court to charge the jury that the owners of the store had the right *so* to use this opening in the sidewalk for the purposes of actual business.

This word "so," as here used, is an important word. It carries us back to the preamble. "So to use" means, "for the purpose of taking in and putting out merchandise *in the course of their business*,"—means, "being opened for that purpose *as required* during the periods of actual use," &c.

But what do these last expressions mean? What does "in the course of their business" mean? Who knows and who is to judge of "the course of *their* business?" It can have no other meaning, if it has any, than that the occupants, whoever they may happen to be, careful or careless, drunk or sober, may

open this hole whenever they please, keep it open as long as they please, and leave it as unguarded as they please.

What does "*taking in* and *putting out merchandise* in the *course of their business*" mean? What does "being open for *that* purpose *as required* during the periods of *actual use*" mean, as here used? Does "actual use" mean while in the act of hoisting out or lowering down a barrel of pork or a box of sugar, or does it mean that "in the *course of their business*, and *for* the purpose of taking in and putting out merchandise *as required*," this hole is to be opened and kept open hours at a time, from morning till night, as porters and draymen chance to come or go. If merchandise is being taken out and put in, or expected to be taken out or put in, *from time to time*, during the day in the *course of their business*, would it not be *in the course of their business* to have this pit open during all the day?

A request to the court to charge in this indefinite, unqualified and general manner is equivalent to a request to charge the jury that the occupants of this store had the right to have this hole in a public sidewalk open whenever and as they thought fit, in the course of their busines, precisely as they would open and keep open the door leading from the sidewalk into their store in the course of their business,—that is, all day,—during all business hours.

3. Turning now from the request to charge to the record, the court have before them a practical meaning of all these phrases, *as* understood and practiced upon by the occupants of the store. The record finds and certifies that "it did not appear who opened the said entrance next before the accident, *but no one was engaged in taking in goods or taking them out, and no one was in the cellar when the plaintiff fell through the opening. One of the occupants of the store and a clerk were in the store over the cellar, and another of the occupants was standing in the street on the opposite side of the same, looking at the procession.*" *This* is what these terms,—"used as required *in the course of their business*" and "actual use,"—mean, as construed and practically acted upon by the occupants; and as the record finds these facts,

this, too, must be the meaning given to these phrases by the defendant. We have the right to presume, that, as this was the manner of use at the time of the accident, and as the defendant claims *that* to be "actual use" in "the course of their business," that this was the kind of use referred to as having existed for forty years, and that "*so to use*" and "*so protected and used*" means precisely the kind of use which the record finds at the time of the accident.

And we here and thus arrive at the meaning of "so to use" and "so protected and used" in the request to charge.

The occupants were not only, not using the opening for any purpose, but there is an entire absence of all evidence that they intended or expected to use it at any time during the day, to take in or put out merchandise. In the absence of all evidence of any such use or intended use, it is left to be inferred, *as it was left utterly unguarded*, that the only purpose for which it was opened was to have some person fall into it.

This purpose was soon effected. The preamble to the request states that the opening had been raised but six or eight minutes. As if six or eight minutes was not long enough, when a crowd of pedestrians were rushing through a street with only one sidewalk (and which they had the right to presume was safe) for somebody to fall into such a pit.

It is submitted, that there was no error in the court's refusing to charge that the owners of the store "*had the right so to use*" this opening in the sidewalk for the purposes of *actual business*, nor was there any error in the refusal of the court to charge "that it was not negligence on the part of the city to allow such an opening *so protected and used* to be continued."

This opening was *liable*, to use the language of the decisions cited, to be open and as entirely unguarded, at any and all times, as it was at the time of the accident.

A sidewalk in the centre of a large city *so liable* to have in it such an opening, so unprotected, cannot be, as the statute requires it to be, safe and convenient.

The charge was quite as favorable for the defendant as the case would warrant.

Indeed, the plaintiff might well have required the court to charge the jury, that if they found the facts as the record finds them,—as the defendant's witnesses testified they were,—that then the owners of the store had *no* right *so to use* the opening, and that it *was* negligence on the part of the city to allow such an opening "so protected and used" to be continued.

WM. H. POTTER,

Counsel for Defendant in Error.

Supreme Court of the United States,

NO. 72.

LEVI BLOSSOM,
Appellant,

vs.

THE MILWAUKEE AND CHICAGO R. R. COMPANY.

BRIEF FOR RESPONDENTS.

THOMAS C. T. BUCKLEY, *Of Counsel.*

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Supreme Court

OF THE UNITED STATES.

LEVI BLOSSOM,
Appellant,
against
THE MILWAUKEE AND CHICAGO R. R. COMPANY,
Respondents.

Respondents' Brief.

On the 22d June, 1858, the Milwaukee and Chicago R. R. Co., being indebted to various persons on their acceptances payable to the order of Bishop & Co., and being also indebted to that firm for monies advanced in aid of the construction of their rail road, for the purpose of securing the payment of such acceptances and advances executed to Bishop and Co., a mortgage on their property in the State of Wisconsin, and on their franchise. (Record, p. 19.)

None of these acceptances having been paid, and the holders thereof having perfected their claims thereon by judgment in all but two instances.—(Record, p. 17, 18, 19.) Bishop and Co., the morgagees, together with the creditors of said Company, whose debts were secured, filed

a bill to foreclose said mortgage in the District Court of the United States for the District of Wisconsin.

This bill having been taken as confessed, the Master to whom it was referred, reported due the complainants on the 5th December, 1861, $254,175.—(Record p. 17.)

By a decree of said Court, made on the day last mentioned, such report was confirmed, and the *mortgaged premises directed to be sold, unless said mortgagor previous to such sale shall pay to the complainants* said sum so reported due with interest from Dec. 5, 1861.—Record p. 28, fol. 45.)

Notice was given by the Marshal of the sale in accordance with the decree, and on the day first appointed for such sale, to wit, June 6, 1862, no bids being received, the sale was adjourned to June 19, 1862; on that day the highest bid made was one from the appellant, Levi Blossom, for $250,000; *but the property was not struck down to him, nor were any terms of sale signed or money paid,* but the sale was adjourned by the Marshal to June 21, 1862. On that day Blossom again bid $262{,}480\frac{12}{100}$ dollars, but without any action being taken on that bid, and without any agreement being signed or deposit made, the sale was again adjourned to October 1, 1862, and from that time to January 15, 1863.—(Record pp. 57, 58, fols. 94, 95, 97.)

On the 9th October, 1862, the complainants in that suit, on payment of the amount due them for principal, interest, and costs, acknowledged satisfaction of the decree, of which the marshal was notified.

Record, p. 56, fol. 92; 59, fol. 97.

The property which was the subject of sale, subject to

incumbrances amounting to six hundred thousand dollars, (Record, p. 54, fol. 89,) was worth half a million of dollars (Record, p. 59, fol. 97).

The first adjournment was had in consequence of these negotiations then started between the stockholders present at sale and the creditors, for whose benefit the decree was being enforced, to settle their claims without a sacrifice of the property (Record, p. 59), and the result of such negotiations was that arrangements were carried out, whereby, as above stated, the decree was satisfied and settled, the reorganization perfected without opposition from appellant, and third parties allowed to acquire rights as creditors and purchasers of stock in the reorganized company.

On the *8th of July*, 1862, the appellant presented his petition to the District Court, claiming that by *virtue of his bid* he had acquired an inchoate *title* to the *property directed to be sold under* the decree, and asking the order of the Court to confirm the sale, and direct a conveyance of the property to him

(Record, p. 56.)

This petition was denied, p. 60, fol. 99, and an appeal prayed to this Court.

FIRST POINT. The examination of the whole record shows, that the act of the Court below in refusing to confirm the sale to Blossom, was entirely a matter of discretion, and not reviewable here.

1. On the motion to dismiss the appeal in this case, this proposition was not considered or decided.

1 Wallace, 655.

In the case of Delaplaine *vs.* Lawrence, 10th page, 605, cited on the motion, the right to the appeal was given by Statute.

2. The proceedings in the Court below, by the 90th General Rule of this Court, promulgated at the January Term, 1842. were regulated by the present practice of the English Chancery. By that practice, no benefit could be claimed by Blossom, the appellant, until the sale was confirmed by the Court.

    1. Sugden, vendors and purchasers, 7th American edition, page 83.
    1. Daniels' Chancery Prac., Vol., 1, p. 909.
    4. Kent's Commentaries, page 193, marginal paging.

3. The same rule has been applied in the United States Court. See the opinion of Judge Story, in the case of Smith against Arnold, 5, Mason Circuit Court Reps., 420, where he says: "In sales "directed by the Court of Chancery, the whole "business is transacted by a public officer, under "the guidance and superintendence of the Court "itself. Even after the sale is made, it is not "final until a report is made to the Court, and it "is approved and confirmed. Either party may "object to the report, and the purchaser himself, "who becomes a party to the sale, may appear be-"fore the Court, and if any mistake has occurred, "may have it corrected."

See, also, Andrews *vs.* Scotton, 2, Bland's Reports, 636, et. seq., where it is held by the Chancellor in Maryland, that applications like that of the appellant are addressed to the conscience of the Court: and that in determining as to the propriety of granting, or refusing, the same, the Court regulates its action not by fixed rules, but by the exer-

cise of its own discretion, according to the circumstances of each particular case.

4. Now, it appears by an inspection of the appellants' petition, Record page 55, fol. 91, that his application so addressed itself and the same record also shows that the Court below had before it all the facts necessery to enable the Judge before whom the application was pending, to determine whether or not the sale should be confirmed. See Record pages 30 to 60, inclusive, especially pages 59 and 49, and Blossom's affidavit, page 46 fol. 77, Carey Affiduvit, p. 59.

That decisions of an inferior tribunal on matters within their discretion, are not appealable. See

Wylie *vs.* Cox, 14 Howard, U. S. Reports, page 1.

The Buffalo Savings Bank *vs.* Newton, 23 New York Reps. page 161.

SECOND POINT.—If, however, the decision appealed from is reviewable here, the order appealed from should be affirmed, and the Judge below held to have properly exercised his discretion.

1. Appellant's argument proceeds on the ground that he acquired an absolute right, by making a bid, and that the Marshal, after such bid was made, could not adjourn the sale, and defendants could not pay the debt, although the property was neither struck down to him, or agreement signed or deposit made.

2. In this he is wrong, by the very terms of the decree, Record page 28, the mortgagors had the right to pay off the debt at any time before the sale.

3. No sale was made at the time they exercised that right; the mere fact of Blossom making a bid created no contract: for a bidding at a sale by auction may be countermanded at any time before the lot is knocked down, as the assent of both parties is necessary to make the contract binding. Till that is done the bidding is nothing more than an offer on one side, which is not binding on the other, till it is assented to.

Sugden on Vendors, 7th Am. Edit. (Perkins) vol. 1, page 25.

4. The Marshal, notwithstanding the bid, had the right to adjourn the sale. It is plain that in this case such adjournment was granted for the purpose of enabling the defendants and its stockholders to make some arrangement by which the mortgage debt might be paid without a sale. Record p. 59. Had he refused to do so under the English practice of opening biddings, or without that, under the equitable circumstances of the case, defendants would have been entitled to a re-sale.

Tripp vs. Cook 26 Wendell 156.

5. Although the appellant cites Hoffmann Masters practice p. 218 to the point that the advertisement is a contract of the court with every bidder who is a stranger to the suit that he shall have the property unless there is a fair advance upon the

sum offered by him and that therefore the Master never should adjourn a sale once opened upon a fair bid of a stranger without his consent; yet in the same book at the foot of the page the author states that there is one case in which under the principles of English authorities, the Master would have a clear right to adjourn on the application of the mortgagor alone, and that it is the course of the English court to favor the mortgagor very much in redeeming the estate, by enlarging the time given in the decree for that purpose, sitting as authority the case of Edwards vs. Cumming, 1 Mad Rep 287.

6. Finally a Marshal like a Master is not a mere machine or the servant of either party but an officer of the Court having a discretion and a duty to exercise it.

Kelly vs. Israel 11 Paige Rep 153.

It results, therefore, that the Court below properly refused to grant the prayer of the petitioner Blossom, because

1. The judgment was satisfied before there was any sale, and the power of the Marshal to sell was thereby extinguished.

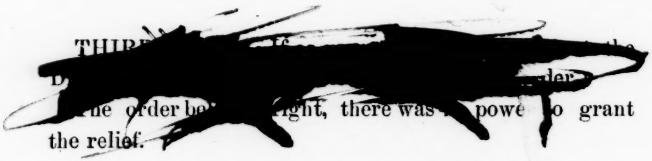
2. It would have been inequitable under the circumstances to have allowed the sale, if the Marshal had not adjourned it, for the reasons stated in Carey's affidavit.

Record, page 59.

See in addition to the authorities above cited the following case:

Collier vs. Whipple, 13 Wendell, Per Nelson Justice, page 226.

And therefore the Court below properly ratified by their decision the conduct of the Marshall.



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T. C. T. BUCKLEY,
of Counsel for Respondents'

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